

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO</p> <p>1437 Bannock Street Denver, CO 80202</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Plaintiff:</p> <p>MICHAEL ANTHONY CAPPELLO</p> <p>v.</p> <p>Defendants:</p> <p>COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT and ROBERT ALAN BONGIOVANNI</p>	
<p>LEWIS ROCA ROTHGERBER CHRISTIE LLP</p> <p>Kris J. Kostolansky, No. 13764 Kenneth F. Rossman, IV, No. 29249 Stephen H. Hennessy, No. 52676 1200 17th Street, Suite 3000 Denver, CO 80202 Phone: (303) 623-9000 Email: kkosto@lrrc.com krossman@lrrc.com shennessy@lrrc.com</p> <p><i>Counsel for Plaintiff Michael Anthony Cappello</i></p>	<p style="text-align: center;">COMPLAINT</p>

Plaintiff Michael Anthony Cappello (“Dr. Cappello”), through his counsel, Lewis Roca Rothgerber Christie LLP, respectfully submits his Complaint against Defendants Colorado Department of Public Health and Environment (“CDPHE”) and Robert Alan Bongiovanni (“Mr. Bongiovanni”). In support thereof, Dr. Cappello states as follows:

SUMMARY

This is a lawsuit about a state employee who identified and tried to correct waste and mismanagement. Dr. Michael Anthony Cappello (“Dr. Cappello”), who was the Director of Disease Control and Public Health Response for the Colorado Department of Public Health and Environment (“CDPHE”), determined and then disclosed that CDPHE was violating federal law with respect to funds it received under the Ryan White CARE Act. With that Act, Congress made financial assistance available to states for the delivery of essential services to individuals and families with HIV/AIDS. For years, Colorado had been improperly using those funds for other purposes, including HIV/AIDS prevention (that is for individuals who do not have HIV/AIDS). Robert Alan Bongiovanni (“Mr. Bongiovanni”) is the former state employee who directed the improper use of the funds.

When Dr. Cappello acted to disclose and correct the problem, the affected community, which has significant political influence, protested because they were disappointed the funds could not continue to be used as they had in the past. The political appointee in charge of CDPHE has close ties to Mr. Bongiovanni. **After Dr. Cappello disclosed the issue, obtained advice from the Office of the Attorney General, and attempted to correct CDPHE’s unlawful expenditures, CDPHE, with the active encouragement and involvement of Mr. Bongiovanni, retaliated against Dr. Cappello by methodically stripping away his responsibilities and eventually terminating his employment.**

PARTIES

1. Dr. Cappello is an individual domiciled in Colorado who was previously employed by CDPHE as its Director of Disease Control and Public Health Response.
2. Dr. Cappello received his Master of Public Health in 2008, and Doctorate with a specialization in Epidemiology in 2012. From 2011 to 2017, Dr. Cappello served as the Executive Director of the Northeast Colorado Health Department. In 2014, Dr. Cappello was appointed by the Governor to the Colorado Board of Health, where he served as its President from 2015 to 2017.
3. Dr. Cappello joined CDPHE in September of 2017. CDPHE is an agency of the State of Colorado with a principal place of business at 4300 Cherry Creek Drive South, Denver, Colorado 80246. CDPHE is Colorado’s principal executive agency responsible for public health.
4. Mr. Bongiovanni is an individual domiciled in Colorado who, until February of 2017, was employed by CDPHE as its Deputy Branch Chief of the STI/HIV/Viral Hepatitis Branch under the Division of Disease Control and Public Health Response. In February of 2017, Mr. Bongiovanni retired from CDPHE and began consulting under the registered trade name Keota Consulting.

5. Mr. Bongiovanni continues to lobby and influence CDPHE. Mr. Bongiovanni maintains an active presence at the meetings of one of CDPHE's advisory boards, the Colorado Alliance for HIV Prevention, Care, and Treatment (the "Alliance"). He holds positions of influence in the Alliance as a member of the Alliance's Fiscal Committee as well as member of the State Drug Assistance Program Subcommittee.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction pursuant to Colo. Const. Art. VI § 9.

7. C.R.S. § 24-50.5-101, et seq. (the "Whistleblower Statute") waives any sovereign immunity that would otherwise apply to CDPHE.

8. At the time of his tortious acts, Mr. Bongiovanni was not an employee of CDPHE.

9. At all relevant times, Dr. Cappello was an employee of CDPHE not in the state personnel system.

10. On March 12, 2020, Dr. Cappello filed a notice of claim against CDPHE with the Office of the Attorney General describing his injuries in substantial compliance with C.R.S. § 24-10-109.

11. Dr. Cappello's injuries arise from unlawful retaliation that he discovered within one hundred eighty-two days of filing his notice of claim.

12. Ninety days have passed after Dr. Cappello filed his notice of claim.

13. All conditions precedent to the maintenance of this action have been satisfied.

14. This Court has personal jurisdiction because CDPHE is an agency of the State of Colorado and Mr. Bongiovanni is domiciled in Colorado.

15. Venue is proper in this Court pursuant to C.R.C.P. 98 because CDPHE and Mr. Bongiovanni are domiciled in the City and County of Denver.

GENERAL ALLEGATIONS

16. CDPHE hired Dr. Cappello in September of 2017 as its Director of the Disease Control and Environmental Epidemiology Division.

17. As the Director of the Disease Control and Environmental Epidemiology Division, Dr. Cappello was responsible for managing communicable disease surveillance and response, and coordinating epidemiology activities for the State of Colorado.

18. As the Director of the Disease Control and Environmental Epidemiology Division, Dr. Cappello was responsible for managing over 220 public health professionals and a budget of over \$100 million in direct funding for epidemiological resources.

19. After Dr. Cappello joined CDPHE, he discovered significant issues involving improper accounting practices, financial mismanagement, and unlawful spending within the STI/HIV/Viral Hepatitis Branch of the Division of Disease Control and Environmental Epidemiology.

20. Dr. Cappello reviewed a Site Visit Report (the "Report") from the United States Department of Health and Human Services Health Resources & Services Administration ("HRSA") concerning CDPHE's administration of the Ryan White HIV/AIDS ("RWHAP") Part B Program.

21. The Ryan White HIV/AIDS Part B Program is a congressionally mandated federal grant program intended to provide "a comprehensive system of care and treatment to people living with HIV (PLWH) in the state of Colorado."

22. The Report explained: "The overall coordination of the RWHAP Part B Program is the responsibility of Deputy Branch Chief of the STI/HIV/Viral Hepatitis Branch at the Colorado Department of Health Environment (CDPHE), which is currently vacant."

23. HRSA conducted its site visit on April 18–20, 2017.

24. Mr. Bongiovanni was Deputy Branch Chief of the STI/HIV/Viral Hepatitis Branch until he retired two months before HRSA's site visit.

25. The Report found that, under Mr. Bongiovanni's leadership, CDPHE's administrative expenses exceeded the allowable limits under the Ryan White CARE Act.

26. The Report found that, under Mr. Bongiovanni's leadership, CDPHE failed to exhaust federal pharmaceutical rebates.

27. The Report found that, under Mr. Bongiovanni's leadership, CDPHE failed to employ proper fiscal monitoring.

28. The Report found that, under Mr. Bongiovanni's leadership, CDPHE was providing RWHAP services to ineligible clients.

29. Dr. Cappello discovered that, under Mr. Bongiovanni's leadership, CDPHE's accounting practices were in violation of fiscal rules, standard business practices, and generally accepted accounting principles.

30. Dr. Cappello discovered that, under Mr. Bongiovanni's leadership, CDPHE had manipulated financial reporting and omitted federal pharmaceutical rebate funds from CDPHE records.

31. Dr. Cappello discovered that, under Mr. Bongiovanni's leadership, CDPHE had been spending federal pharmaceutical rebate funds on improper purposes.

32. Dr. Cappello discovered that, because of improper accounting practices, financial mismanagement, and unlawful spending, the State of Colorado had and would continue to lose millions of dollars in funding for STI and HIV programs.

33. Dr. Cappello discovered information relating to the waste of public funds, abuse of authority, and mismanagement within CDPHE.

34. In December of 2017, Dr. Cappello provided to his then-supervisors, Deputy Medical Director Tista S. Ghosh ("Dr. Ghosh"), Deputy Executive Director Karin McGowan ("Ms. McGowan"), and Executive Director Larry Wolk ("Dr. Wolk") the information he discovered.

35. Dr. Cappello ultimately requested that CDPHE perform an audit of the STI/HIV/Viral Hepatitis Branch, but CDPHE declined to perform the audit Dr. Cappello requested.

36. In January of 2018, Dr. Cappello disclosed in writing the information he discovered to the Alliance.

37. In January of 2018, Dr. Cappello further disclosed in writing the information he discovered to the Colorado Board of Health.

38. In May and June of 2018, Dr. Cappello provided to Dr. Ghosh, Ms. McGowan, and Dr. Wolk, additional information arising from his investigation into the STI/HIV/Viral Hepatitis Branch finances.

39. In August of 2019, Dr. Wolk resigned from CDPHE and Ms. McGowan became its Interim Executive Director.

40. In October of 2018, Mr. Bongiovanni advised CDPHE that it need not spend federal pharmaceutical rebates in accordance with federal regulations and RWHAP policy, and

that pushing back against federal law was appropriate: “With my clients, I refer them back to the law and leave it up to them (and their attorneys) to decide how aggressively they want to ‘push back’ against HRSA.”

41. Thereafter, a CDPHE employee acknowledged that under Mr. Bongiovanni’s leadership and advice, CDPHE had been spending federal pharmaceutical rebates on expansive and unlawful purposes: “What I seem to recall is that there was discussion between Eric Schleiger, Bob Bongiovanni, Mel Mattson and others about how ‘aggressive’ the state should be in its interpretation of state’s rights . . . In this aggressive approach, funds could be used for more expansive purposes—whether the copay was made with federal or state dollars.”

42. After Dr. Cappello discovered this information, he requested an internal review of how CDPHE had been spending federal pharmaceutical rebates.

43. The preliminary review identified ambiguities, and recommended that CDPHE obtain a legal interpretation.

44. Dr. Cappello shared this information with his supervisors, Dr. Ghosh and then-Interim Executive Director, Ms. McGowan.

45. Upon Dr. Cappello’s request, Ms. McGowan sought an internal legal evaluation from CDPHE’s Director of Legal and Regulatory Compliance.

46. In January of 2019, Jill Hunsaker Ryan (“Ms. Ryan”) was appointed Executive Director of CDPHE.

47. Shortly thereafter, Dr. Cappello provided to Ms. Ryan the same information he had provided to Dr. Ghosh, Ms. McGowan, and Dr. Wolk.

48. Dr. Cappello made a good-faith effort to provide his supervisors and appointing authorities with the information he had discovered.

49. Despite Dr. Cappello’s good-faith effort, CDPHE failed to take remedial action.

50. Dr. Cappello remained concerned about the lawfulness of CDPHE’s fiscal practices.

51. Accordingly, in January of 2019, Dr. Cappello disclosed in writing the information he discovered to the Office of the Governor.

52. Despite this disclosure, CDPHE’s executive leadership failed to take remedial action.

53. Accordingly, in May of 2019, Dr. Cappello disclosed in writing the information he discovered to the Colorado Board of Health.

54. In May of 2019, Dr. Cappello further disclosed in writing the information he discovered to the Office of the Attorney General.

55. The Ryan White CARE Act provides: “It is the purpose of this Act . . . to make financial assistance available to States and other public or private nonprofit entities to provide for . . . the delivery of essential services to individuals and families with HIV disease.” 42 U.S.C. § 300ff.

56. The Ryan White CARE Act further provides: “The Secretary shall, subject to the availability of appropriations, make grants to States to enable such States to improve the quality, availability and organization of health care and support services for individuals and families with HIV/AIDS.” *See* 42 U.S.C. § 300ff-21.

57. Under the Ryan White CARE Act, states must prioritize the spending of federal pharmaceutical rebates on therapeutics for eligible individuals who have been diagnosed with HIV/AIDS. *See* 42 U.S.C. § 300ff-26.

58. Under the Ryan White CARE Act, states are prohibited from exceeding statutory limits on non-core medical services, such as administrative expenses. *See* 42 U.S.C. § 300ff-22(b)(1).

59. Under the Ryan White CARE Act, states are prohibited from spending federal pharmaceutical rebates on biomedical prevention for individuals who have not been diagnosed with HIV/AIDS. *See* 42 U.S.C. §§ 300ff-21, 26.

60. As far back as 2010, HRSA expressly warned RWHAP participants: “Ryan White HIV/AIDS Program funds cannot pay for PrEP as the person using PrEP is not HIV infected and therefore not eligible for Ryan White HIV/AIDS Program funded medication.” *See* Health Resources & Services Administration, *Program Letter RE Pre-Exposure Prophylaxis (PrEP)*, <https://hab.hrsa.gov/sites/default/files/hab/Global/preexposureltr1012.pdf> (Dec. 2, 2010).

61. In 2016, HRSA once again warned RWHAP participants: “The RWHAP legislation provides grant funds to be used for care and treatment of people diagnosed with HIV, thus prohibiting the use of RWHAP funds for PrEP medications and the related medical services such as physician visits and laboratory costs.” *See* Health Resources & Services Administration, *Program Letter RE The Ryan White HIV/AIDS Program and Pre-Exposure Prophylaxis (PrEP)*, https://hab.hrsa.gov/sites/default/files/hab/Global/preletter062216_0.pdf (June 22, 2016).

62. In August and September of 2019, the Office of the Attorney General advised CDPHE on the proper use of federal pharmaceutical rebates under the Ryan White CARE Act.

63. Through his actions, Dr. Cappello attempted to bring CDPHE's spending practices into compliance with federal law.

64. In September of 2019, Dr. Cappello disclosed in writing to the Alliance: "The use of federal rebate funds, both standard and supplemental, will be managed in compliance with federal HRSA Ryan White Program rules. These funds must be used for direct service delivery with a focus on people living with HIV. There are limited allowances to support activities for people at risk of HIV acquisition and for administrative costs to administer programs."

65. In November of 2019, Dr. Cappello disclosed in writing to the Alliance that CDPHE would be forced to reduce funding for administrative services, HIV pre-exposure prophylaxis (PrEP), and HIV testing.

66. In response to Dr. Cappello's efforts to end CDPHE's unlawful spending, Mr. Bongiovanni expressed outrage to the Alliance. Mr. Bongiovanni accused Dr. Cappello of retaliating against CDPHE staff members who had attempted to continue the unlawful practices Mr. Bongiovanni had utilized while he was Deputy Branch Chief at CDPHE.

67. Despite acknowledging that he had directed CDPHE to spend federal pharmaceutical rebates in violation of federal law, Mr. Bongiovanni lashed out at Dr. Cappello for attempting to correct those unlawful practices: "We knew that we had transformed the drug assistance program money into biomedical prevention . . . The last straw for me is when I learned that plan had been discarded, destroyed, never paid attention to . . ."

68. Because Dr. Cappello had disclosed Mr. Bongiovanni's unlawful conduct and attempted to bring CDPHE into compliance with federal law, Mr. Bongiovanni orchestrated a "no-confidence vote" by the Alliance against Dr. Cappello.

69. Because Dr. Cappello had disclosed Mr. Bongiovanni's unlawful conduct and attempted to bring CDPHE into compliance with federal law, Mr. Bongiovanni disparaged Dr. Cappello to CDPHE's executive leadership.

70. Because Dr. Cappello had disclosed Mr. Bongiovanni's unlawful conduct and attempted to bring CDPHE into compliance with federal law, Mr. Bongiovanni demanded that CDPHE's executive leadership reprimand Dr. Cappello.

71. Mr. Bongiovanni ultimately leveraged his personal relationship with his former mentee, Ms. Ryan, and advised CDPHE to punish Dr. Cappello in retaliation.

72. CDPHE retaliated against Dr. Cappello on account of his disclosure of information.

73. CDPHE threatened Dr. Cappello with reassignment, reduction of responsibilities, reduction in force, and termination on account of his disclosure of information.

74. In December of 2019, CDPHE removed the STI/HIV/Viral Hepatitis Branch from Dr. Cappello's responsibilities on account of his disclosure of information. This branch employed approximately 65 individuals.

75. In December of 2019, CDPHE falsely accused Dr. Cappello of mismanaging CDPHE finances.

76. In February of 2020, Dr. Cappello disclosed to an external investigator for the Office of the Attorney General that he was being retaliated against by CDPHE on account of his disclosure of information.

77. In March of 2020, CDPHE removed the Operations & Finance Branch from Dr. Cappello's responsibilities on account of his disclosure of information. This branch employed approximately 30 individuals.

78. In March of 2020, the number of employees for whom Dr. Cappello was responsible shrunk from approximately 220 to approximately 125.

79. In March of 2020, CDPHE began excluding Dr. Cappello—its highest ranking epidemiologist—from critical functions associated with the COVID-19 Pandemic Response on account of his disclosure of information.

80. Despite demands by the Alliance for an external and independent audit, CDPHE chose to perform its own internal investigation, and in April of 2020, falsely attributed financial mismanagement to Dr. Cappello.

81. In May of 2020, CDPHE completely removed Dr. Cappello from the COVID-19 Pandemic Response on account of his disclosure of information.

82. In May of 2020, CDPHE placed Dr. Cappello on administrative leave on account of his disclosure of information.

83. And in June of 2020, CDPHE terminated Dr. Cappello on account of his disclosure of information. In explaining the reasons for his termination, Ms. Ryan referred to the "no-confidence" vote of the Alliance that had been engineered by Mr. Bongiovanni to cover up his unlawful acts as Deputy Branch Chief.

84. CDPHE and Mr. Bongiovanni subjected Dr. Cappello to reassignment, reduction of responsibilities, reduction in force, reprimand, admonishment, and termination on account of his disclosure of information.

85. CDPHE and Mr. Bongiovanni caused Dr. Cappello reputational harm.

86. CDPHE and Mr. Bongiovanni negatively impacted Dr. Cappello's employability and career prospects. As CDPHE's Director of Disease Control and Public Health Response, Dr. Cappello had secured one of the most sought after public health positions in the State. In light of his wrongful termination and the limited number of comparable positions available, it will be extremely difficult for him to find comparable employment.

87. Dr. Cappello has and will continue to lose income because of CDPHE and Mr. Bongiovanni's retaliatory conduct.

88. Further, Dr. Cappello has and will continue to suffer from emotional distress because of CDPHE and Mr. Bongiovanni's retaliatory conduct.

FIRST CLAIM FOR RELIEF
(Violation of the Whistleblower Statute Against CDPHE)

89. Dr. Cappello incorporates the allegations contained in Paragraphs 1 through 88.

90. Dr. Cappello discovered information relating to the waste of public funds, abuse of authority, and mismanagement within CDPHE.

91. Dr. Cappello made a good faith effort to provide the information he discovered to his supervisors and appointing authorities.

92. Dr. Cappello subsequently disclosed the information in writing.

93. In violation of C.R.S. § 24-50.5-103, CDPHE initiated and administered disciplinary action, including loss of responsibilities and termination, against Dr. Cappello on account of his disclosure of information and efforts to bring CDPHE into compliance with federal law.

94. Under C.R.S. § 24-50.5-105, Dr. Cappello is entitled to recover damages, together with court costs, and any other relief this Court deems appropriate.

SECOND CLAIM FOR RELIEF
(Tortious Interference Against Mr. Bongiovanni)

95. Dr. Cappello incorporates the allegations contained in Paragraphs 1 through 94.

96. Dr. Cappello had a contract of employment with CDPHE.

97. Mr. Bongiovanni knew of Dr. Cappello's contract of employment with CDPHE.

98. Mr. Bongiovanni, through his disparagement of and demands against Dr. Cappello, intentionally caused CDPHE to terminate Dr. Cappello's contract of employment with CDPHE.

99. Mr. Bongiovanni's interference with Dr. Cappello's contract of employment was improper, and was predicated on Mr. Bongiovanni's attempt to cover up his own unlawful conduct and retaliate against Dr. Cappello for disclosing and attempting to correct said unlawful conduct.

100. Mr. Bongiovanni's interference with Dr. Cappello's contract of employment was fraudulent, malicious, willful, and wanton.

101. Mr. Bongiovanni's interference with Dr. Cappello's contract of employment has and will continue to cause Dr. Cappello damages.

PRAYER FOR RELIEF

CDPHE and Mr. Bongiovanni retaliated against Dr. Cappello for disclosing that CDPHE was violating federal law. In order to protect the monetary resources of the State of Colorado, Plaintiff Michael Anthony Cappello requests that this Court enter judgment in his favor and against Defendants Colorado Department of Public Health and Environment and Robert Alan Bongiovanni, award Dr. Cappello his damages, costs, interest, and attorneys' fees, and enter any other relief it deems appropriate. When permitted under the Civil Rules, Dr. Cappello will seek to amend his complaint to assert a claim for punitive damages against Mr. Bongiovanni.

PLAINTIFF MICHAEL ANTHONY CAPPELLO DEMANDS A TRIAL BY JURY

Respectfully submitted June 29, 2020.

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