

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

CHRISTY J. HARGESHEIMER and)
RICHARD S. HARGESHEIMER,)

CASE NO. CI 15-3476

Plaintiffs,)

ORDER

vs.)

JOHN GALE, Secretary of State for the)
State of Nebraska, NEBRASKANS FOR)
THE DEATH PENALTY, INC., a Nebraska)
Corporation and Ballot Question)
Committee, JUDY GLASBURNER,)
AIMEE MELTON, and BOB EVNEN,)

Defendants.)

This matter came on for hearing on November 16, 2015, on the motions to dismiss (filings #1 and #4) filed by Defendant John Gale and Defendants Nebraskans for the Death Penalty, Inc., Judy Glasburner, Aimee Melton, and Bob Evnen (collectively "Defendants"). Alan E. Peterson, Amy Miller, and Jerry Soucie appeared on behalf of Plaintiffs Christy J. Hargesheimer and Richard S. Hargesheimer ("Plaintiffs"). Assistant Attorney General Ryan S. Post appeared for Defendant John Gale. Stephen D. Mossman and L. Steven Grasz appeared on behalf of Defendants Nebraskans for the Death Penalty, Inc., Judy Glasburner, Aimee Melton, and Bob Evnen (the "Sponsor Defendants"). Argument was heard and the matter submitted. The court, being fully advised, finds and orders as follows:

Facts

On June 1, 2015, a referendum petition was filed with the Nebraska Secretary of State seeking to suspend and repeal LB 268, 104th Legislature, First Session (2015). (Compl. ¶ 8). The referendum petition seeks to refer to the voters of the State of Nebraska, at the November 8,

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2016 general election, the question of whether or not the death penalty should be reinstated as law by repealing LB 268. *Id.*

When the referendum petition was submitted to the Secretary of State on June 1, 2015, a document captioned “Sworn List of Sponsors” was also filed with that office. (Compl. ¶¶ 4, 11; Ex. A to Sponsor Defendants’ Motion to Dismiss, Filing #1). The Sworn List of Sponsors contained the names and street addresses of Nebraskans for the Death Penalty, Inc., Judy Glassburner, Aimee Melton, and Bob Evnen, who are named as defendants in this case. *Id.* Nebraskans for the Death Penalty, Inc. is a Nebraska corporation and is registered as a Ballot Question Committee in favor of the referendum on LB 268. (Compl. ¶ 3). Judy Glassburner, Aimee Melton, and Bob Evnen are each identified in the Sworn List of Sponsors as a Board member of Nebraskans for the Death Penalty, Inc. (Compl. ¶ 4). The Sworn List of Sponsors did not include the name of Nebraska Governor Pete Ricketts or any other person except the listed Sponsor Defendants. (Compl. ¶ 11).

Plaintiffs, Dr. Christy J. Hargesheimer and Richard S. Hargesheimer, are residents of the State of Nebraska, registered voters, and citizen supporters of LB 268. (Compl. ¶ 1). Plaintiffs filed the instant action on September 17, 2015, alleging that the omission of Governor Ricketts’ name from the Sworn List of Sponsors is fatal to the referendum petition because “Governor Ricketts is in actuality the primary initiating force behind and one of the sponsors of this Referendum petition.” (Compl. ¶ 11). Plaintiffs allege that Governor Ricketts is an undisclosed sponsor based on several actions taken by the Governor including that: Governor Ricketts warned persons involved with LB 268 that a referendum would ensue if his veto was overridden; the Governor requested, ordered, or encouraged his close allies to take on various roles related to promoting the referendum, beginning on or before the June 1, 2015 filing date of the referendum petition; the Governor raised money for the referendum using his title as Governor in letters to Nebraskans during the summer of 2015; Governor Ricketts and his father became the largest financiers and donors to the referendum campaign; the Governor and his representatives solicited monetary contributions from other political, social, or business allies; the Governor personally or through his close advisors and agents managed, organized, and controlled the referendum campaign; and one of the Sponsor Defendants, Aimee Melton, “was recruited by someone ‘close

to the Governor.” (Compl. ¶ 13).

In the Complaint, Plaintiffs ask the court to enter a declaratory judgment finding that the failure of the Sponsor Defendants to disclose by a sworn statement that Governor Ricketts was a sponsor of the referendum petition regarding LB 268 violates NEB. REV. STAT. § 32-1405(1) (Reissue 2008) and renders the referendum petition invalid. Plaintiffs seek an injunction to enjoin the Defendant Secretary of State, John Gale, from placing the proposed referendum on the ballot for the general election on November 8, 2016.

The Sponsor Defendants and the Defendant Secretary of State have filed motions to dismiss the Complaint pursuant to NEB. CT. R. PLDG. § 6-1112(b)(6).

Standard of Review

In reviewing a motion to dismiss under NEB. CT. R. PLDG. § 6-1112(b)(6), the court accepts as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader’s conclusions. *Zawaideh v. Nebraska Dep’t of Health and Human Servs. Reg. and Licensure*, 280 Neb. 997, 1004, 792 N.W.2d 484, 492 (2011). To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. *Doe v. Board of Regents*, 280 Neb. 492, 506, 788 N.W.2d 264, 278 (2010). In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim. *Id.*

Analysis

The sole issue presented to the court by the Defendants’ motions to dismiss is whether Plaintiffs have alleged sufficient facts, accepted as true, to state a plausible claim that the failure to include Governor Ricketts as a listed “sponsor” on the sworn statement filed with the Nebraska Secretary of State renders the referendum petition on LB 268 legally insufficient under NEB. REV. STAT. § 32-1405(1). That statute provides:

Prior to obtaining any signatures on an initiative or referendum petition, a statement of the object of the petition and the text of the measure shall be filed with the Secretary of State together with a sworn statement containing the names

and street addresses of every person, corporation, or association sponsoring the petition.

NEB. REV. STAT. § 32-1405(1). The sworn statement provision in § 32-1405(1) is mandatory, not directory, and failure to file a sworn statement of sponsors and their addresses will render a referendum petition legally insufficient. *Loontjer v. Robinson*, 266 Neb. 902, 910–11, 670 N.W.2d 301, 308 (2003).

Plaintiffs argue that, because § 32-1405(1) requires a sworn statement listing “every person . . . sponsoring the petition,” such a list may not omit a person who because of his sponsoring activity prior to and at the time of the filing of the sworn statement is a “sponsoring person.” (Pl. Brief at 5). Plaintiffs assert that they have alleged sufficient facts, taken as true, in support of their claim that Governor Ricketts is an undisclosed sponsor of the referendum petition on LB 268 and, thus, have stated a claim for relief that is plausible on its face. While Plaintiffs suggest that the court need not inquire any further in the context of these motions to dismiss, Plaintiffs’ claim that the Governor is a sponsor of the referendum petition begs the question: What is the meaning of “sponsor” in § 32-1405(1)? “Statutory interpretation presents a question of law.” *Project Extra Mile v. Neb. Liquor Control Comm’n*, 283 Neb. 379, 385, 810 N.W.2d 149, 156–57 (2012). Therefore, as Defendants argue, if Plaintiffs’ claim is based on a legally flawed interpretation of the term “sponsor” in § 32-1405(1), then no set of facts, accepted as true, would cure the defect in Plaintiffs’ Complaint and Defendants would be entitled to dismissal. *See Young v. City of St. Charles*, 244 F.3d 623, 627 (8th Cir. 2001) (“[D]ismissal under Rule 12(b)(6) serves to eliminate actions which are fatally flawed in their legal premises and deigned to fail, thereby sparing litigants the burden of unnecessary pretrial and trial activity.”)

A. Statutory Interpretation & Right of Referendum

The court is guided by familiar principles of statutory interpretation in determining the meaning of sponsor in NEB. REV. STAT. § 32-1405(1). “In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.” *State v. Mucia*, 292 Neb. 1, 5, 871 N.W.2d 221, 224 (2015). In construing a statute, courts look to the

statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served. *Fisher v. Payflex Sys. USA, Inc.*, 285 Neb. 808, 817, 829 N.W.2d 703, 712 (2013). A court must then place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose. *Id.*

In interpreting § 32-1405(1), the court is also cognizant of the well-established rules governing the construction of statutes relating to the right of initiative and referendum reserved to the people in NEB. CONST. art. III, § 1. The constitutional provisions regarding the initiative and referendum are self-executing, but the Nebraska Constitution authorizes legislation to facilitate the operation of the processes. NEB. CONST. art. III, § 4.

In Nebraska, “[t]he right of initiative [and referendum] is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter.” *State ex rel. Brant v. Beermann*, 217 Neb. 632, 636, 350 N.W.2d 18, 21 (1984) (quoting *McFadden v. Jordan*, 32 Cal. 2d 330, 332, 196 P.2d 787, 788 (1948)). The right of referendum in NEB. CONST. art. III, § 3 “reserves to the people the right to act in the capacity of legislators. The presumption should be in favor of the validity and legality of their act. The law should be construed, if possible, so as to prevent absurdity and hardship and so as to favor public convenience.” *Klosterman v. Marsh*, 180 Neb. 506, 513, 143 N.W.2d 744, 749 (1966) (quoting *State ex rel. Ayres v. Amsberry*, 104 Neb. 273, 278, 177 N.W. 179, 180 (1920)). “Legislation which hampers or renders ineffective the power reserved to the people is unconstitutional,” and courts must give a statute an interpretation which meets constitutional requirements if it can reasonably be done. *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 211, 602 N.W.2d 465, 475 (1999). Because of the importance of the referendum, the right “must be liberally construed to promote the democratic process and . . . should not be circumscribed by restrictive legislation or narrow and strict interpretation of the statutes pertaining to its exercise.” *State ex rel. Morris v. Marsh*, 183 Neb. 521, 531, 162 N.W.2d 262, 269 (1968).

B. Meaning of “Sponsor” in NEB. REV. STAT. § 32-1405(1)

In interpreting § 32-1405(1), the court is guided by the case of *Loontjer v. Robinson*, 266 Neb. 902, 670 N.W.2d 301 (2003), and, particularly, by the concurring opinion of then-Chief Justice Hendry. In that case, the plaintiff, Loontjer, challenged the placement of the defendant

gaming committee members' gambling initiative on the ballot. This court, in a decision by the Honorable Paul D. Merritt Jr., determined there was substantial compliance with the requirement of a sworn statement of sponsors in § 32-1405(1), but enjoined the placement of the initiative on the ballot based on a violation of the single subject rule. The defendants appealed and Loontjer cross-appealed. The Nebraska Supreme Court affirmed the district court's decision on other grounds. Specifically, the Court addressed Loontjer's cross-appeal and held that "[t]he initiative petition was legally insufficient because it omitted a sworn statement of the sponsors and their street addresses." *Id.* at 911, 670 N.W.2d at 309. In so holding, the Court did not address the single subject rule, nor did the court address the definition of sponsor in § 32-1405(1). *Id.* at 912, 670 N.W.2d at 309.

Although the full court did not address the definition of "sponsor," Chief Justice Hendry did in his concurrence. In defining "sponsor" under NEB. REV. STAT. § 32-1405(1), the Chief Justice explained:

The term "sponsor," as used in § 32-1405(1), is not defined in the statutes setting forth the procedure by which the initiative process is to be exercised. "Sponsor" is defined as "one who assumes responsibility for some other person or thing." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, Unabridged 2204 (1993).

In adopting a definition of the term "sponsor" in this circumstance, we must keep in mind that "the right of initiative . . . should not be circumscribed by restrictive legislation or narrow and strict interpretation of the statutes pertaining to its exercise." *State, ex rel. Morris v. Marsh*, 183 Neb. 521, 531, 162 N.W.2d 262, 269 (1968). Within that framework, it seems reasonable to define sponsor as simply one who identifies himself or herself as willing to assume statutory responsibilities once the initiative process has commenced. *See, e.g.*, § 32-1405(2) (requiring Secretary of State to provide sponsor(s) with suggested changes made to initial proposal by Revisor of Statutes); NEB. REV. STAT. § 32-1409(3) (Reissue 1998) (requiring Secretary of State to notify "the person filing the initiative" whether, in opinion of Secretary of State, sufficient valid signatures have been collected to meet constitutional and statutory requirements); NEB. REV. STAT. § 32-1412(2) (Reissue 1998) (notifying sponsor(s) that in any suit commenced to enjoin Secretary of State from placing measure on official ballot, sponsor(s) of record will be party defendant(s) in such suit). In my view, those individuals agreeing to accept such responsibilities were identified in the documents filed with the Secretary of State.

Loontjer, 266 Neb. at 916, 670 N.W.2d at 311–12 (Hendry, C.J., concurring).

In his concurrence, the Chief Justice went on to address Loontjer's contention that one individual's significant backing, financial or otherwise, mandated the individual's identification as a sponsor of the initiative and concluded that such support did not equate to sponsorship. *Id.* at 917, 670 N.W.2d at 312. The Chief Justice reasoned:

The predecessor to § 32-1405(1) required the filing of a statement containing "the name or names of every person, corporation or association sponsoring said petition *or contributing or pledging contribution of money or other things of value*" with the Secretary of State. (Emphasis supplied.) *See* 1939 Neb. Laws, ch. 34, § 13, p. 184. Thus, even the predecessor of § 32-1405(1) recognized a possible distinction between one who sponsors a petition initiative and one who financially contributes to that effort.

Section 32-1405(1), as currently codified, goes even further by eliminating any filing requirement with the Secretary of State for those financially contributing to such petition effort. Such involvement must now be disclosed by filing with the Nebraska Accountability and Disclosure Commission. *See, e.g.,* NEB. REV. STAT. §§ 49-1454 and 49-1455 (Reissue 1998 & Cum. Supp. 2002).

Id.

Defendants rely on the definition of "sponsor" set forth in the *Loontjer* concurrence and argue that, under that definition, Governor Ricketts was not required to be listed as a sponsor on the sworn statement filed along with the referendum petition on LB 268. Rather, by their submission of the Sworn List of Sponsors on June 1, 2015, Defendants Nebraskans for the Death Penalty, Inc., Glasburner, Melton, and Evnen identified themselves as willing to assume the statutory responsibilities once the petition process commenced. The court agrees. The concurrence in *Loontjer* is highly persuasive and, based on that authority, the court similarly concludes that a "sponsor" under NEB. REV. STAT. § 32-1405(1) is "one who identifies himself or herself as willing to assume statutory responsibilities once the initiative process has commenced." *Loontjer*, 266 Neb. at 916, 670 N.W.2d at 311–12 (Hendry, C.J., concurring).

In so finding, the court rejects Plaintiffs' argument that the definition from the *Loontjer* concurrence is not supported by a plain reading of the statute and is incompatible with the purposes of § 32-1405(1). Plaintiffs do not explicitly offer their own definition of "sponsor" under § 32-1405(1), but rather suggest that their allegation that Governor Ricketts "is in actuality the primary initiating force" behind the referendum "is a good start toward a reasonable

definition of . . . a ‘sponsoring person.’” (Pl. Brief at 9; Compl. ¶ 11). Plaintiffs also suggest that a sponsor under the statute is “one who presents and supports a legislative proposal” and “one that finances a project, event, or organization directed by another person or group.” (Pl. Brief at 12). These broad definitions, however, could potentially ensnare a large number of unknown people in any initiative or referendum effort. The court cannot interpret § 32-1405(1) in such a way that would leave an initiative or referendum petition subject to attack based on uncertainty as to whether a sworn statement of sponsors is complete or valid, particularly where there are no specific statutory criteria articulating who is required to be a sponsor.

Defining “sponsor” as one who identifies himself or herself as willing to assume statutory responsibilities once the petition process has commenced is supported by a plain, ordinary reading of the term. Indeed, Plaintiff’s suggestion that a sponsor includes “one who presents and supports a legislative proposal” is consistent with the definition from *Loontjer*. It is well-known that one who presents a legislative bill as a sponsor is the senator who agrees to put his or her name on the bill and be responsible for the bill when it is introduced to the legislature, but there is no requirement that the sponsor be the person who thought of the bill, drafted the bill, or lobbies for the bill. Additionally, Plaintiffs’ suggestion that the definition of sponsor would include someone who provides financial support to a referendum effort runs contrary to § 32-1405(1) as presently codified. The Legislature long ago removed the financial contribution reporting requirement from § 32-1405(1), and such reports are now made to the Nebraska Accountability and Disclosure Commission. *See Loontjer*, 266 Neb. at 917, 670 N.W.2d at 312 (Hendry, C.J., concurring) (discussing predecessor statute); L.B. 637, 91st Leg., 1st Reg. Sess. (Neb. 1989) (removing financial contribution reporting requirement from predecessor to § 32-1405(1) and amending Nebraska Political Accountability and Disclosure Act provisions relating to ballot question committees). Thus, as the *Loontjer* concurrence noted, a “sponsor” is distinct from one who financially contributes to the effort. *Id.*

The definition of “sponsor” adopted by the court herein also achieves the purposes of § 32-1405(1). In *Loontjer*, the Court identified the threefold purpose behind the sworn statement provision in § 32-1405(1).

Requiring a sworn statement is not an onerous duty. Further, the sworn

statement requirement serves several important purposes. First, by providing a sworn statement, the sponsors take responsibility for the petition and expose themselves to potential criminal charges if information is falsified. *See* NEB. REV. STAT. § 32-1502 (Reissue 1998) (making election falsification under oath Class IV felony). This requirement prevents fraud in the process. Second, the provision allows the public and the media to scrutinize the validity and the completeness of any list of sponsors. Knowing the petition's sponsor could affect the public's view about an initiative petition. For example, a petition sponsored by a large casino might have less appeal to some members of the public than a petition sponsored by local citizens. A sworn list of the sponsors and their street addresses allows the public to make an informed judgment whether to sign the petition. Third, under § 32-1412, the sponsor of an initiative shall be a necessary party to any suit seeking to enjoin the placement of an initiative on the ballot. The failure to provide a sworn statement of the sponsors and street addresses can frustrate the ability to join necessary parties in a lawsuit.

Loontjer, 266 Neb. at 911, 670 N.W.2d at 308.

As the Plaintiffs have pled, the Sponsor Defendants have taken responsibility for the petition and will face the consequences for any falsification of information in the process. By providing their names and street addresses, the Sponsor Defendants have also identified themselves as the necessary parties to this suit. Finally, Plaintiffs' allegations make it clear that the sworn statement containing the names and street addresses of the Sponsor Defendants enabled Plaintiffs and other members of the public to scrutinize the list of sponsors. As Plaintiffs have alleged in this case, Nebraskans for the Death Penalty, Inc. is a registered ballot committee and, as such, is required to disclose financial contributors like Governor Ricketts to the Nebraska Accountability and Disclosure Commission, which makes such information available to the public. *See* NEB. REV. STAT. §§ 49-1454, 49-1455, and 49-14,141 (Reissue 2010 & Cum. Supp. 2014). In their Complaint, Plaintiffs acknowledge that they were aware of the Governor's contributions. (Compl. ¶¶ 13, 16). Therefore, based on Plaintiffs' allegations, the purposes of §32-1405(1) were achieved in this case.

The foregoing establishes that the purpose and meaning of the term "sponsor" under Nebraska law cannot be as all-encompassing as Plaintiffs suggest. A sponsor is one who identifies himself or herself as willing to assume statutory responsibilities once the petition process has commenced. *Loontjer*, 266 Neb. at 916, 670 N.W.2d at 311–12 (Hendry, C.J., concurring). Sponsorship requires some affirmative act or acknowledgment on behalf of the

individual so as to hold themselves out as sponsors of the petition. It is not difficult to envision a scenario in which a person strongly advocates for, supports, or even initially proposes a referendum but is disinclined to take on the added statutory responsibilities of being a “sponsor.” Under Plaintiffs’ strict reading of “every person . . . sponsoring the petition” in § 32-1405(1), such a person would risk being caught within the ambit of the sponsorship provision and, consequently, may avoid lending support to the referendum effort. Given the potentially chilling effects of such an outcome, the court must avoid such a strict interpretation of the statute as it would hinder, rather than facilitate, the people’s referendum rights. See NEB. CONST. art. III, § 4; *State ex rel. Morris v. Marsh*, 183 Neb. at 525, 162 N.W.2d at 266 (“Laws to facilitate the operation of the amendment must be reasonable, so as not to unnecessarily obstruct or impede the operation of the law.” (quoting *State ex rel. Ayres v. Amsberry*, 104 Neb. at 278, 177 N.W. at 180)).

C. Requirements of NEB. REV. STAT. § 32-1405(1) Have Been Met

For purposes of Defendant Gale’s ministerial duties, the allegations of the Complaint establish that all statutory requirements pursuant to § 32-1405(1) have been met. On June 1, 2015, prior to obtaining any signatures, the identified Sponsor Defendants submitted to the Secretary of State a statement of the object of the petition and the text of the measure. Concurrently, the Sponsor Defendants submitted a sworn statement containing their names and street addresses. The court may take judicial notice of these public filings. *DMK Biodiesel, LLC v. McCoy*, 285 Neb. 974, 979, 830 N.W.2d 490, 495 (2013).

If no sworn statement had been filed, the petition would have been deemed legally insufficient. *Loontjer*, 266 Neb. at 911, 670 N.W.2d at 309. Because a sworn statement containing the statutorily required information was filed in this case, the Secretary of State was obligated to proceed with performing his statutory duties pursuant to NEB. REV. STAT. § 32-1405. As all the requirements of § 32-1405(1) have been met, Defendants are entitled to dismissal of Plaintiffs’ Complaint.

Conclusion

Since Plaintiffs’ Complaint is predicated on an erroneous interpretation of NEB. REV. STAT. § 32-1405(1), it is defective as a matter of law. No facts, taken as true, have been or could

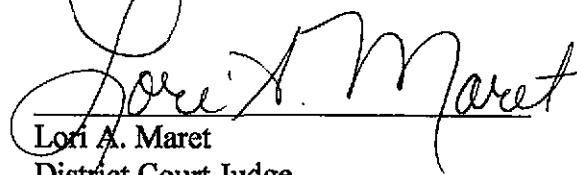
be alleged which would change this result. This fatal defect is evident on the face of the Complaint as it is the basis for the only claim asserted therein. Stated another way, "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations of the complaint." *Briehl v. GMC*, 172 F.3d 623, 627 (8th Cir. 1999). Consequently, the Complaint fails to state a claim upon which relief can be granted and should be dismissed.

IT IS, THEREFORE, ORDERED that

1. Defendants' motions to dismiss (filings #1 and #4) are granted;
2. Plaintiffs' Request to Expedite (filing #3) is overruled as moot; and
3. Plaintiffs' Amended Complaint is dismissed with prejudice. Costs are taxed to Plaintiff.

DATED this 29th day of January, 2016.

BY THE COURT:


Lori A. Maret
District Court Judge

cc: Alan E. Peterson, Amy Miller, and Jerry Soucie, Attorneys for Plaintiffs
Ryan S. Post, Assistant Attorney General
Stephen D. Mossman and L. Steven Grasz, Attorneys for Sponsor Defendants

CERTIFICATE OF SERVICE

I, the undersigned, certify that on February 1, 2016 , I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

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ryan.post@nebraska.gov

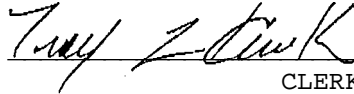
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BY THE COURT:


CLERK

