DATE FILED: June 06, 2018 4:23 PM

DISTRICT COURT, WELD COUNTY, COLORADO 901 9th Avenue, Greeley, Colorado 80631 **PLAINTIFF:** MARGARET R. COLUCCI, V. **DEFENDANTS:** NATIONAL BOARD OF CHIROPRACTIC EXAMINERS; SALVATORE D. LARUSSO; STEVEN R. CONWAY; JOHN C. NAB; PAUL N. MORIN; DANIEL M. COTE; LEROY F. OTTO; JOHN R. MCGINNIS; FARREL GROSSMAN; AND KIRK SHILTS	
	▲ COURT USE ONLY ▲
	Case No. 2018CV30203

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

Having reviewed Defendants National Board of Chiropractic Examiners, et. al, Motion to Dismiss and considered the relief requested therein.

BACKGROUND

On March 7, 2018 Plaintiff filed a Complaint against the Defendants, National Board of Chiropractic Examiners ("the NBCE"), and individuals: Dr. Salvatore Larusso, Dr. Steven Conway, Dr. John Nab, Dr. Paul Morin, Dr. Daniel Cote, Dr. Leroy Otto, Dr. John McGinnis, Dr. Farrel Grossman and Dr. Kirk Shilts (individuals collectively hereinafter referred to as "the Board Members"). The Plaintiff's Complaint asserted three different claims, (1) breach of fiduciary duty against the Board Members, (2) aiding and abetting breach of fiduciary duty against the NBCE, and (3) declaratory judgment against all Defendants.

The NBCE is a Texas non-profit corporation with a principal place of business in Colorado. The Board Members are all doctors whom reside in various states – none of which are Colorado – and in all times relevant to the Plaintiff's Complaint serve on the NBEC Board in different capacities. The Board Members, in varying amounts, have attended NBEC meetings in Colorado and conducted business with individuals in Colorado related to NBEC.[1] Plaintiff is a practicing chiropractor and resident of the state of Nevada and served as a NBCE Board member from 2015 to February 23, 2018.

On February 23, 2018, the NBCE Board held a meeting in Phoenix, AZ. At this meeting the NBEC Board voted to remove the Plaintiff from the board by way of a 9 – 2 vote. Each of the individual Defendants voted in favor of Plaintiff's removal. Plaintiff's Complaint alleges misconduct by the Board Members in her removal and filed this lawsuit.

In response, Defendants have filed a Motion to Dismiss the Plaintiff's claims pursuant to C.R.C.P 12(b)(2) and 12(b)(5). More specifically Defendants are arguing, (1) this Court lacks personal jurisdiction over the Board Members, (2) the Plaintiff lacks standing to bring her claims because the Board Members do not owe her a fiduciary duty, (3) the Board Members are immune from liability pursuant to Colorado statute which protects volunteers of non-profit organizations and, (4) for multiple reasons the Plaintiff cannot maintain an action for declaratory judgment.

For the reasons set forth herein, the Motion is denied.

[1] This statement is merely a generalization of the background of the case and should not be considered determinative as to the ruling of the Court.

ANALYSIS

I. Personal Jurisdiction C.R.C.P. 12(b)(2) Over the Board Members

Plaintiff asserts two claims against the Board Members, breach of fiduciary duty and declaratory judgment. The Board Members claim however, that the they do not have sufficient contacts with Colorado to warrant the Court exercising personal jurisdiction – specific or general – over them.

a. Standard of Review

In reviewing a motion to dismiss for lack of personal jurisdiction, this Court must determine whether Colorado's long arm statute, codified at § 13-1-124, C.R.S., allows this Court to exert jurisdiction over the defendant. Since Colorado's long arm statute allows the exercise of jurisdiction to the fullest extent allowed by law, the analysis requires determining whether the exercise of jurisdiction over the defendant is permitted by the Due Process Clause of the Fourteenth Amendment. *See Safari Outfitters, Inc. v. Sup. Court*, 448 P.2d 783 (Colo. 1968). As a result, much of the governing legal authority is found in federal law.

Under federal law, the exercise of personal jurisdiction satisfies the Due Process Clause where the non-resident defendant has sufficient minimum contacts with the forum state such that it can be said that the defendant purposefully availed himself of the protections of the forum state's law. *See Burger King Corp. v. Rudzewicz*, 741 U.S. 462, 105 S.Ct. 2174, 85 L.Ed. 2d 528 (1985); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154 (1945). Jurisdiction under the minimum contacts test can exist in one of two ways: General jurisdiction, which subjects the defendant to jurisdiction in the forum state for all claims, exists where the defendant's contacts with the forum state are continuous and systematic. *See Trierweiler v. Croxton & Trench*

Holding Corp., 90 F.3d 1523 (10^{th} Cir. 1996). Specific jurisdiction, which subjects the defendant to jurisdiction in the forum state only for claims arising out of their forum-related contacts, exists where the defendant has purposefully directed his activities towards the forum state and the claim arises directly from those activities. *See Foundation for Knowledge in Development v. Interactive Design Consultants, LLC,* 234 P.3d 673, 678 (Colo. 2010).

When a court's exercise of personal jurisdiction is challenged, it is the plaintiff's burden to make a prima facie showing that the exercise of jurisdiction is appropriate. *See Behagen v. Amateur Basketball Assoc.*, 744 F.2d 731 (10^{th} Cir. 1984). Such a showing is made where the allegations in the Complaint, to the extent not contradicted by the defendant's affidavits, show that minimum contacts exist. Insofar as there are factual disputes between the competing affidavits, all such disputes must be resolved in favor of the plaintiff. *See id.* at 733. "Whether a court may exercise personal jurisdiction over a non-resident defendant is a question of law." *In re Marriage of Malwitz*, 99 P.3d 56, 59 (Colo. 2004).

b. General Personal Jurisdiction

The Board Members first argue that general jurisdiction does not exist because Plaintiff fails to establish contacts with Colorado that are "continuous and systematic, of a general business nature." *See Keefe v. Kirschenmaum & Kirschenbaum, P.C.*, 40 P.3d 1267, 1271 (Colo. 2002). Plaintiff counters that with Colorado's long-arm statute being intended to allow Colorado courts to assert jurisdiction to the maximum extent permissible under due process, in the least, prima facie showing has been made.

"General jurisdiction, or all-purpose jurisdiction, permits a court to exercise jurisdiction over a defendant for any and all causes of action arising from any of the defendant's activities, even if those activities occurred outside the forum state." *Magill v. Ford Motor Co.*, 379 P.3d 1033, 1037 (Colo. 2016). The exercise of general jurisdiction requires significantly more contacts than the exercise of specific jurisdiction, and in particular a defendant's "activities must be continuous and systematic, of a general business nature." *Keefe v. Kirschenbaum & Kirschenbaum, P.C.*, 40 P.3d 1267, 1271 (Colo. 2002). This standard has been defined as when the defendant is "essentially at home" in Colorado. *Magill,* at 1037. A nonresident defendant's contacts with the state will rarely justify exercising general jurisdiction. *Id.* "[O]nly a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there." *Daimler Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014).

Case law has established that general jurisdiction, or all-purpose jurisdiction, is a higher bar than specific jurisdiction. Further, courts have limited the application of general jurisdiction to non-residents in a state. In this case, none of the Board Members own businesses in Colorado, they are not legal residents of Colorado nor are they registered to vote. None own property in Colorado and none conduct banking in Colorado. None have a driver's license issued by Colorado or pay taxes in Colorado. Plaintiff has alleged that the Board Members only connection to Colorado is through work done with NBCE. These connections do not satisfy a non-resident to be considered to "at home" in Colorado. Therefore, this Court cannot claim personal jurisdiction over the Board Members via general jurisdiction.

c. Specific Jurisdiction

The Board Members next argue that there is no specific jurisdiction because the litigation of this case does not arise out of the Colorado-related contacts of the Board Members. More specifically, Plaintiff's removal from the board had no effect in Colorado. Plaintiff countered that the Board Members breached their fiduciary duties owed to NBCE (a Colorado resident) causing injury to the Plaintiff and as a result this litigation arises out of their forum-related contacts.

Whether the Board Members are subject to specific jurisdiction in Colorado requires a two-step inquiry: (i) whether each Board Members' contacts with Colorado reflect that they have purposefully availed themselves of the privilege of conducting business here, and (ii) whether the Plaintiff's claims against them arises out of their forum-related contacts. *Foundation for Knowledge*, at 678. If the Court finds that these elements have been met, it must "determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice," which determination "is essentially one of reasonableness." *Id.* at 682.

In general, single or infrequent acts by a defendant related to a forum are insufficient to establish jurisdiction when they create only an attenuated affiliation with the forum, but a defendant who deliberately creates continuing obligations between himself and residents of the state will be held to have availed himself of the privilege of conducting business in this state and is therefore subject to the jurisdiction of the state's courts. Id. at 679. As long as the defendant has purposefully availed himself of the privilege of conducting activities within another state, both Colorado courts and the Supreme Court have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985); *Keefe*, at 1271. "It is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and telephone communications across state lines." *Id.* citing (*Burger King Corp.*, 476).

The Court finds that each element favors finding that the Board Members are subject to specific jurisdiction in Colorado. First, the Board Members have purposefully availed themselves of the privilege of conducting business in Colorado. "It is essential that there be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Keefe*, at 1271; *Hanson v. Denckla*, 357 U.S. 235, 253, (1958); *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 319, 66 S. Ct. 154, 160, 90 L. Ed. 95 (1945); *Lichina v. Futura, Inc.*, 260 F. Supp. 252, 256 (D. Colo. 1966). Here, the Board Members all chose to become a member of a board for a non-profit corporation with its headquarters in Colorado; all have made communications to Colorado furthering the NBCE's objectives, all have created continuous obligations between themselves and the NBCE (a Colorado resident) and at least in some part attended meetings in Colorado.[2] See *Keefe,* 40 P.3d 167 (There was purposeful availment when an attorney deliberately accepted the responsibility of representing a Colorado client.)

Defendants attempts to claim that these connections are limited, "random or fortuitous". See *Keefe,* 40 P.3d 1267. The Court is incapable of believing that communications about the operations of NBCE to Colorado, traveling to meetings in Colorado and gaining the benefit from being on the board of a non-profit with its headquarters in Colorado, is random or fortuitous. In this case the Board Members purposefully availed themselves for the purpose of conducting

[2] Defendants note that two of the Board Members – Dr. McGinnis and Dr. Shilts – have never attended a NBCE meeting in Colorado. However, there still is a deliberate and continuous obligation to Colorado for purposeful availment.

business in Colorado. The question next is if the Plaintiff's claims against them arises out of their forum-related contacts.

As far as the "arising out of" prong of the specific jurisdiction test is concerned, "the contacts must proximately result from actions of the defendant that create a 'substantial connection' with the forum state. *Keefe,* at 1271. Here, the substantial connection to Colorado is the Board Members' positions on the NBCE board which are a continuous obligation. The claims by the Plaintiff are (1) that the Board Members breached their duty to the NBCE and (2) a lack of compliance with NBCE's governing documents and applicable law when removing the Plaintiff from the board. Plaintiff's claims clearly arose out of Defendants' forum-related activity (acting as board members for the NBCE).

Since the Court finds that the elements of specific jurisdiction have been met, it must "determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice," which determination "is essentially one of reasonableness." *Foundation for Knowledge*, at 682. The factors the Court may consider in making this determination include: (1) the burden on the defendant; (2) the forum state's interest in resolving the controversy; and (3) the plaintiff's interest in attaining effective and convenient relief. *Foundation for Knowledge*, at 682.

While not dispositive, the burden on the defendant of litigating the case in a foreign forum is of primary concern in determining the reasonableness of personal jurisdiction. *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1096 (10th Cir. 1998). However, in certain cases, the interests of the plaintiff and the forum in exercising jurisdiction may be so strong as to "justify even the serious burdens placed on the alien defendant." *Id.* While none of the Board Members reside in Colorado it has already been established that they have continuous sufficient contacts with Colorado. Also, while the potential claim in this case took place in Arizona – the board meeting voting Plaintiff out – much of the evidence is presumably electronic, thereby mitigating the burden of gathering and presenting this evidence in Colorado. See *Foundation for Knowledge*, at 682. Second, "Colorado has strong interest in resolving any controversy involving a nonprofit corporation headquartered and incorporated within the state." *Id.* This is undoubtedly the case here: NBCE is a non-profit headquartered in Colorado and the dispute involves actions by the NBCE's board. Finally, Plaintiff's interest in litigating the case in Colorado is naturally strong. With the Board Members being from many different states, Colorado provides her an opportunity to avoid "piecemeal litigation" and litigate the case in one location. See *OMI Holdings, Inc.*, at 1097. Examining these factors together, the Court holds that it is reasonable for Colorado to exercise personal jurisdiction over the Board Members.

In summary, in terms of personal jurisdiction, there is no general jurisdiction over the Board Members in Colorado. However, the Board Members have purposefully availed themselves in Colorado, the claims of the Plaintiff arise out of their forum-related contacts and it is reasonable for Colorado to extend personal jurisdiction over them. Therefore, the Court denies the Board Members Motion to Dismiss on the grounds that there is no personal jurisdiction over the Board Members.

II. Failure to State a Claim – Rule 12(b)(5)

Defendants argue that there are multiple theories which establish Plaintiff's claims cannot be brought and move to dismiss them under Rule 12(b)(5). They argue (1) the Plaintiff lacks standing to bring claims for breach of fiduciary duty against the Board Members or aiding and abetting of breach of fiduciary duty against the NBCE, (2) the claims against the Board Members are barred by C.R.S. § 13-21-115.7(2) and (3) there is no actual controversy to merit a declaratory judgment.

a. Standard of Review – Rule 12(b)(5)

The purpose of a motion to dismiss for failure to state a claim upon which relief can be granted is to test the formal sufficiency of the complaint. *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286 (Colo.1992). Motions to dismiss for failure to state a claim under C.R.C.P. 12(b)(5) are "viewed with disfavor and are rarely granted." *Id.* at 1291 (quoting *Davidson v. Dill*, 180 Colo. 123, 131, 503 P.2d 157, 162 (1972)). In addition, the allegations of the complaint must be viewed in the light most favorable to the plaintiff. *Dunlap* at 1291. However, "recitals of the elements of a cause of action supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009).

When passing on a motion to dismiss a complaint, the court may only consider the matters stated in the pleadings. *Glover v. Southard,* 894 P.2d 21 (Colo. App. 1994). Documents referred to in the complaint and central to a plaintiff's claim may be considered by a court on a motion to dismiss without converting the motion to dismiss into a motion for summary judgment, notwithstanding that the documents are not formally incorporated by reference or attached to the complaint. *Titan Indem. Co. v. Travelers Property Cas. Co. of America*, 181 P.3d 303, 306 (Colo. App. 2007).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); see *Warne* *v. Hall*, 2016 CO 50, ¶ 24 (adopting the "plausible on its face" standard set out in Iqbal and Twombly).

b. Standing

Defendants first argument under Rule 12(b)(5) is that Plaintiff lacks standing to bring either the breach of fiduciary duty or the aiding and abetting breach of fiduciary duty claims because the Board Members do not owe her a fiduciary duty. Plaintiff argues that Colorado law recognizes standing to sue for breach of a fiduciary duty owed to a third party.

Generally, standing relates to a plaintiff's ability to bring an action in court. To establish standing, a plaintiff must show she suffered (1) an injury in fact, (2) to a legally protected interest. Injury in fact exists if "the action complained of has caused or has threatened to cause injury." *Kreft v. Adolph Coors Co.*, 170 P.3d 854, 857 (Colo. Ct. App. 2007). A legally protected interest must arise "from a constitutional, statutory, or judicially created rule of law that entitles the plaintiff to some form of judicial relief." *Bd. of County Comm'rs v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045, 1053 (Colo. 1992). Breach of a fiduciary duty is cognizable at common law as a protected interest.

"Before there can be a breach of a fiduciary duty, a fiduciary relationship or a confidential relationship must exist." *Turkey Creek, LLC v. Rosania*, 953 P.2d 1306, 1312 (Colo. Ct. App. 1998) (citing *Vikell Investors Pacific, Inc. v. Kip Hampden, Ltd.*, 946 P.2d 589 (Colo. App. 1997)). To state a claim for breach of fiduciary duty, a plaintiff must show "(1) that the defendant is acting as a fiduciary of the plaintiff; (2) that he breaches a fiduciary duty to the plaintiff; (3) that the plaintiff incurs damages; and (4) that the defendant's breach of fiduciary duty is a cause of the plaintiff's damages." *Graphic Directions v. Bush*, 862 P.3d 1020 1022 (Colo. App. 1993).

The elements of aiding and abetting a breach of fiduciary duty include: (1) breach by a fiduciary of a duty owed to a plaintiff, (2) a defendant's knowing participation in the breach, and (3) damages. *Nelson v. Elway*, 971 P.2d 245, 249 (Colo. App. 1998).

It is undisputed in this case that no fiduciary duty existed between the Defendants and Plaintiff. So, it is required to analyze if Colorado does recognize standing for suit for breach of a fiduciary duty owed to a third party as Plaintiff claims.

The case cited by Plaintiff as the crutch of her argument is *Taylor v. Taylor,* 381 P.3d 428. In T*aylor*, the court examined whether the child beneficiary of her mother's trust could maintain an action for breach of fiduciary duty against the trustee. *Id.* at 430-431. The court recognized that generally Colorado law provides that a plaintiff cannot recover damages based on a fiduciary duty not owed to them, but to someone else and whether they could was an issue of standing. *Id.* at 431-432. The court held that a plaintiff may maintain a breach of fiduciary duty where the duty is owed to a third party. *Id.* Specifically, that a settlor's children had standing to bring an action against a trustee for breach of fiduciary duty even though the trustee's fiduciary duty was owed to the settlor and not to the children. *Id.* Referring directly to the issue of standing, the court found that the beneficiaries had a "legally protected interest" and even though the duty did not flow to them directly, the breach of duty to the settlor injured their legally protected interest. *Id.* at 432. They found this by using supportive case law from California and the reading of Colorado's Probate Code. *Id.* citing (*in Estate of Giraldin*, 55 Cal.4th 1058, 150 Cal.Rptr.3d 205, 290 P.3d 199 (2012). One section of the Probate Code the court looked to was C.R.S. § 15-10-504(2)(a), this section allows for surcharges to be awarded to "interested persons" if a trustee breached a fiduciary duty. *Id.* The *Taylor* court noted that § 15–10–504 did not "create remedies or procedures for adjudicating tort claims…[r]ather, it is part of a broader section of law dealing with judicial 'oversight' or 'supervision' of fiduciaries in the administration of estates." *Id.* at 433.

In this case, the application of *Taylor* provides the Plaintiff with standing for her breach of fiduciary duty claims. C.R.S. § 7-128-101 requires that all Colorado non-profits have a board of directors. Further sections of § 7-128 provide rules on various things regarding non-profit boards such as: qualifications of directors, election of directors, removal of directors…etc. This type of oversight and supervision provided by statute for non-profit boards of directors is analogous to the Probate Codes oversight and supervision of trustees. Based upon *Taylor*, Plaintiff could pursue a claim for a breach of fiduciary duty that proved harmful to her, even though the duty by the Board Members was owed to NBCE. Further, since she could pursue the breach of fiduciary duty claim against the Board Members she could also pursue a claim against NBCE for adding and abetting breach of a fiduciary duty.

Therefore, the Court denies the Defendants' to Dismiss on the grounds that the Plaintiff lacks standing.

c. C.R.S. § 13-21-115.7(2)

Defendants second claim under Rule 12(b)(5) is that the Board Members are shielded from liability based upon CRS § 13-21-115.7(2). The statute provides:

> …in addition to the provisions of section 13-21-116(2)(b), on and after April 23, 1992, any person who serves as a director, officer, or trustee of a nonprofit corporation or nonprofit organization and who is not compensated for serving as a director, officer, or trustee on a salary or prorated equivalent basis shall be immune from civil liability for

> any act or omission which results in damage or injury if such person was acting within the scope of such person's official functions and duties as a director, officer, or trustee unless such damage or injury was caused by the willful and wanton act or omission of such director, officer, or trustee.

§ 13-21-115.7(2)

The Plaintiff argues that exceptions to the statute apply to bypass the immunity, namely (1) that the Board Members received compensation, (2) because the complaint alleges facts plausibly establishing their willful and wonton acts and (3) omissions.

The first argument, compensation exception, fails for the Plaintiff. She has failed to plead in her complaint any facts relating to the Board Member's compensation. Plaintiff has attempted to supplement additional facts about compensation in the Response Opposing Motion to Dismiss. However, under Rule 12(b)(5) "the court may only consider the matters stated in the pleadings." *Glover v. Southard,* 894 P.2d 21 (Colo. App. 1994).

The second argument, willful and wonton acts, is better pleaded in the Plaintiff's complaint. In evaluating a motion to dismiss for failure to state a claim upon which relief can be granted, court may consider only those matters stated in the complaint and must accept all allegations of material fact as true, viewing the allegations in the light most favorable to the plaintiff. *Lambert v. Ritter Inaugural Comm., Inc.*, 218 P.3d 1115, 1119 (Colo. App. 2009). "Such motions are viewed with disfavor, and a complaint is not to be dismissed unless it appears beyond doubt that the plaintiff cannot prove facts in support of the claim that would entitle the plaintiff to relief." *Id.* In Plaintiff's complaint ¶ 105, it is claimed "Individual Defendants breached their fiduciary duties with a pattern or series of improper and wrongful acts in an effort to improperly remove Plaintiff from the Board or force her resignation." Based upon reading this allegation and others from the complaint in light most favorable to the plaintiff, the Court is not convinced that the Plaintiff would not be entitled to relief beyond a reasonable doubt. See *Holland v. Board of County Commissioners*, 883 P.2d 500 (Colo.App.1994) (allegation that defendant intentionally and maliciously interfered with plaintiff's appointment as county attorney by providing false and defamatory information sufficiently stated facts that, accepted as true, adequately asserted willful and wanton conduct). Further, to dismiss this complaint for lacking exact language of "willful and wonton" would go against the nature of C.R.C.P 8, which only requires the complaint "serve notice of the claim asserted and need not express a complete recitation of all the facts which support the claim for relief." *Eliminator, Inc. v. 4700 Holly Corp.*, 681 P.2d 536, 539 (Colo. App. 1984).

The last argument Plaintiff provides for the civil immunity statute not applying is the omissions exception. Omission is defined as "failure to do something; esp., a neglect of duty…" BLACK'S LAW DICTIONARY 1121 (8th ed. 2004). With the claims of breach of a fiduciary duty and aiding and abetting breach of fiduciary duty, the complaint unquestionably alleges plausible failures or neglects by the Board Members and NBCE.

Therefore, the Court denies the Defendant's Motion to Dismiss on grounds that the Plaintiff fails to state a claim due to § 13-21-115.7(2).

III. Declaratory Judgment

Defendants argues that without personal jurisdiction and Plaintiff's failure to state a claim for which relief can be granted, there is no actual controversy that would merit declaratory judgment. In light of the above findings of the Court, that there is personal jurisdiction over the Board Members and there are claims which relief can be granted, the court denies the Defendants' Motion to Dismiss the Plaintiff's third claim for declaratory judgment.

IV. Nonresponse by Plaintiff

Plaintiff's Complaint asserts three claims, (1) breach of fiduciary duty against the Board Members, (2) aiding and abetting breach of fiduciary duty against the NBCE, and (3) declaratory judgment against all Defendants. Defendants' Motion to Dismiss requests the court to dismiss all three claims.

In Defendants' Reply in Support of Motion to Dismiss they content that Plaintiff's response did not address the NBCE's contention that Plaintiff has failed to state a claim against it for aiding and abetting breach of fiduciary duty because the Plaintiff has failed to show the existence of a fiduciary duty. In addition, Defendants' claim that Plaintiff's response did not address Defendants' contentions that Plaintiff has failed to state a claim for declaratory judgment because she lacks standing and has failed to allege an actual controversy.

Although C.R.C.P. 121 section 1–15(3) provides that the failure of a party to respond to a motion "may be considered a confession of the motion," courts have not applied that rule where a drastic remedy is at stake. See *Seal v. Hart*, 755 P.2d 462, 465 (Colo.App.1988)("[c]onsidering the drastic nature of the remedy of summary judgment, and the fact that a specific rule should govern over a general one, we conclude that the provisions of C.R.C.P. 121 concerning confession of a motion by not filing a response thereto, are inapplicable to a motion for summary judgment under C.R.C.P. 56"); see also *Meyer v. State*, 143 P.3d 1181, 1184 (Colo.App.2006) (failure to respond to motion for reversal of driver's license revocation would not be deemed a confession of that motion); *Artes–Roy v. Lyman*, 833 P.2d 62, 63 (Colo.App.1992) (prerequisite findings supporting awards of attorney fees "cannot be held to be confessed by failure to respond to a motion for fees"). With the drastic remedy, dismissal, at stake here the Court will not consider the non-response to the contention that Plaintiff has failed to state a claim against the NBCE for aiding and abetting breach of fiduciary duty. This is especially true in light of the Plaintiff's response to the motion otherwise.[3]

CONCLUSION

The Defendants' Motion to Dismiss is **DENIED.**

Marcelo A. Kopcow
District Court Judge

[3] Defendants are mistaken that Plaintiff did not response to the issues surrounding the declaratory judgment raised in their motion to dismiss. On page 15, footnote 7 of Plaintiff's Response, Plaintiff address the declaratory judgment issue.