IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-00076-RM-KLM

In re PETITION of
ALLIANCE OF NUCLEAR WORKERS ADVOCACY GROUPS,
ROCKY FLATS DOWNWINDERS,
CANDELAS GLOWS/ROCKY FLATS GLOWS,
ENVIRONMENTAL INFORMATION NETWORK (EIN), INC.,
ROCKY FLATS NEIGHBORHOOD ASSOCIATION,
ROCKY FLATS RIGHT TO KNOW, and
ROCKY MOUNTAIN PEACE & JUSTICE CENTER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), Respondent the United States of America moves to dismiss the Petition, ECF No. 1.

INTRODUCTION

Petitioners—seven environmental advocacy groups—invoke Federal Rule of Criminal Procedure 6(e) in an attempt to obtain access to documents received via grand jury subpoena more than thirty years ago. Petitioners are fishing for information that might support hypothetical future advocacy litigation related to the cleanup of the former Rocky Flats Nuclear Weapons Plant ("Rocky Flats"). Petitioners lack standing to seek these materials, however, because there is no presumptive right of public access to pre-existing third-party discovery

documents obtained via grand jury subpoena. Even if there were such a right, the Petition fails to state a claim under Rule 6(e). The Petition should be dismissed.

BACKGROUND

I. A Brief History of Litigation Related to the Rocky Flats Grand Jury.

The materials Petitioners seek relate to a thirty-year-old grand jury proceeding. This court empaneled Special Grand Jury 89-2 on August 1, 1989, to investigate potential environmental crimes at Rocky Flats. *See In re Special Grand Jury 89-2*, 450 F.3d 1159, 1163 (10th Cir. 2006) (hereinafter, "*SGJ89-2*"). At the conclusion of the grand jury investigation, in 1992, the contractor responsible for operating Rocky Flats, Rockwell International Corp., "pleaded guilty to five felonies and five misdemeanors and agreed to pay a fine of $18.5 million." *Id.* In parallel with the criminal action, a *qui tam* lawsuit under the False Claims Act was also filed; this action was ultimately resolved by the United States Supreme Court. *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007).

Production of nuclear weapons components at Rocky Flats ended in the early 1990s, and beginning in 1996, the United States and the State of Colorado conducted a $7 billion environmental cleanup. Also in 1996, eighteen members of the original Rocky Flats grand jury filed an action "seeking permission to release information and freedom to speak publicly about their experience as grand jurors and their perceptions of the conduct of government employees and Department of Justice lawyers." *SGJ89-2*, 450 F.3d at 1164. In relevant part, the grand jurors asked that the court enter an order pursuant to Federal Rule of Criminal Procedure 6(e)—the same authority relied on by Petitioners here—permitting them to speak about their experience, as well as unsealing portions of testimony provided to the grand jury and documents

prepared by the grand jury in the course of their service. *SGJ89-2*, 450 F.3d at 1165. This request was ultimately resolved twelve years later, when the court denied the request in substantial part, unsealing only a few of the pleadings filed in the 1996 action, and none of the grand jury materials. *See In re Special Grand Jury 89-02*, No. 96-Y-00203-RPM, 2008 WL 1956672, at *5-6 (D. Colo. May 5, 2008).

In 2001, Congress designated the site as a national wildlife refuge. *See* Rocky Flats National Wildlife Refuge Act of 2001, Pub.L. 107-107, 115 Stat. 1379. The Refuge (which does not include the 1,300 acres that housed the weapons site and monitoring areas, which remain under the jurisdiction of the Department of Energy) was established in 2007. *See generally* About the Refuge, https://www.fws.gov/refuge/Rocky_Flats/about.html (last visited March 26, 2019).

II. Summary of the Petitioners' Claim and the Materials They Seek.

Petitioners in this case do not claim any relationship with the original Rocky Flats grand jurors whose claims were addressed in the *Special Grand Jury 89-2* litigation. Nor are they seeking disclosure of details of the grand jury proceedings, as were the grand jurors in the prior case. Petitioners are, instead, "concerned community groups," ECF No. 1 at 3, that seek the pre-existing business records obtained via grand jury subpoena to, in essence, audit the cleanup of Rocky Flats in the hopes of supporting hypothetical future advocacy litigation. *See id.* at 2 (Petitioners seek the discovery materials "as necessary and required to reasonably evaluate the remediation methodology and risk analysis used at Rocky Flats upon which the agencies' determination and imminent threats to the region rely").

The Petitioners seek "the managing contractors' [e.g., Rockwell's] documents related to the use and disposal of hazardous substances, whether planned, accidental or clandestine." *Id.* at 4. This includes "public and business documents" gathered pursuant to nine listed grand jury subpoenas. *Id.* at 23-24. In all, Petitioners speculate that "more than 760 boxes of documents and information," encompassing as much as "three and a half million pages of documents" may be subject to their request for disclosure. *Id.* at 24.

Petitioners do not, however, seek transcripts of grand jury testimony, records of the grand jury proceedings, or any documents prepared by the grand jury itself. They thus seek only the discovery materials obtained from Rockwell and third parties as part of the investigation. *See* ECF No. 1 at 26 ("Petitioners' request for disclosure of these documents, and *not for any transcripts, reports, or other notes*, poses no threat to any individual who appeared before or was investigated by the Grand Jury." (emphasis added)).

LEGAL STANDARD

The subject matter jurisdiction of the federal courts is limited to "cases" and "controversies." U.S. Const., Art. III. The doctrine of standing has "developed . . . to ensure that federal courts do not exceed" this authority. *Spokeo, Inc. v. Robins*, ___ U.S. ___, 136 S.Ct. 1540, 1547 (2016). To have standing, a plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). A lack of standing is properly raised via a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). *See Hill v. Vanderbilt Capital*

Advisors, LLC, 702 F.3d 1220, 1224 (10th Cir. 2012) ("Our court has repeatedly characterized standing as an element of subject matter jurisdiction.").

Under Fed. R. Civ. P. 12(b)(6), an action may be dismissed for "failure to state a claim upon which relief may be granted." "[T]o withstand a Rule 12(b)(6) motion to dismiss, a complaint must contain enough allegations of fact, taken as true, 'to state a claim to relief that is plausible on its face.'" *Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In ruling on a Rule 12(b)(6) motion, the court should "disregard conclusory statements and look only to whether the remaining, factual allegations plausibly suggest the defendant is liable." *Khalik*, 671 F.3d at 1191. The court should consider "whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007).

ARGUMENT

I. PETITIONERS LACK STANDING SINCE THEY HAVE NO RIGHT OF ACCESS TO GRAND JURY DISCOVERY MATERIALS.

To establish an injury-in-fact, the first element of Article III standing, Petitioners' allegations must show that they have suffered "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. The Supreme Court has used both the phrase "legally protected interest" and the phrase "judicially cognizable interest" to describe the type of interest required to establish an injury in fact. *See SGJ89-2*, 450 F.3d at 1172 (quoting *Bennett v. Spear*, 520 U.S. 154, 167 (1997)). As explained below, Petitioners do not have a sufficient legally protected interest in access to the discovery materials they seek to show standing.

First, Petitioners cannot establish standing based on any connection to the grand jury itself. In *Special Grand Jury 89-2*, the Tenth Circuit concluded that the Rocky Flats grand jurors' First Amendment interest in being permitted to talk about their experience was "of sufficient moment" to qualify as an injury-in-fact giving them standing to bring their action. *Id.* ("In this light, it is apparent that [the Rocky Flats grand jurors] have a 'judicially cognizable interest' in stating what they know. That interest is the same interest justifying standing to myriad litigants who have brought First Amendment claims challenging restrictions on their speech."). This interest also extended to the grand jury transcripts and work product documents the jurors sought because "public disclosure of the documents will both delineate what they can talk about and protect them against claims that what they say has gone beyond what is permitted." *Id.* at 1173.

Here, in contrast, Petitioners were not members of the grand jury. They have no connection to the grand jury and may not take advantage of this First Amendment theory to demonstrate injury-in-fact. And the Tenth Circuit has never held that other members of the general public such as Petitioners all have a similar right of access to grand jury-related materials that is "of sufficient moment," *SGJ89-2*, 450 F.3d at 1172, to establish in injury-in-fact and support filing a civil action.

Second, the materials Petitioners seek are not court documents over which the public could assert a right of access. Petitioners do not seek any documents prepared by the grand jury itself, or any record of any testimony given before the grand jury, or any records of the grand jury's proceedings. ECF No. 1 at 26. Instead, the documents Petitioners seek are more akin to "pre-trial discovery materials" that never were considered by the court. Petitioners admit that the

documents they seek are "public and business documents" that predate the grand jury investigation and that were "created in the regular conduct of the business of Rocky Flats' managing contractors," not by the grand jury itself. ECF No. 1 at 2, 28. Such documents are not subject to any public right of access.

This view was recognized by the Seventh Circuit in *Carlson v. United States*, 837 F.3d 753, 757-61 (7th Cir. 2016).[1] There, a historian sought access to transcripts of grand jury testimony of a witness accused of violating the Espionage Act during World War II. *Id.* at 756-57. While the court observed that "grand-jury transcripts are, in their very nature, judicial documents," *id.* at 760, the Seventh Circuit—as relevant here—drew "a sharp line," *id.* at 760, between grand-jury transcripts and other "pre-trial discovery materials that were never filed with the court." *Id.* at 760. The court noted that "there is no statutory, rule-based, common-law, or constitutional right of the public to obtain discovery documents that are never filed with the court." *Id.* at 760.[2] These documents are more like "discovery that never makes it through the courthouse door" than documents "created under the authority of the grand jury." *Carlson*, 837 F.3d at 760; *cf. also Rohrbough v. Harris*, 549 F.3d 1313, 1320 (10th Cir. 2008) (deposition

[1] In *Carlson*, the United States argued that the authority of federal courts to unseal grand jury materials is limited to those circumstances enumerated in Rule 6(e). The Seventh Circuit did not adopt this position, *see* 837 F.3d at 761-62, but because Petitioners here rely only on Rule 6(e)(3)(E)(i) and not on any inherent, non-Rule-based authority of the Court, that issue is not presented here.

[2] The Seventh Circuit in *Carlson* spoke in terms of "civil" discovery materials, 837 F.3d at 760, because it was discussing the issue in the context of its earlier decision in *Bond v. Uteras*, 585 F.3d 1061 (7th Cir. 2009), a case addressing when third parties have standing to intervene pursuant to Fed. R. Civ. P. 24 to seek non-filed discovery documents. The rationale of both *Carlson* and *Bond* applies with equal force to pre-existing third-party business records obtained via grand jury subpoena.

transcripts become "records" for the purposes of the Federal Records Act only when they are filed with the court or used at trial).

Because the discovery documents sought by the Petitioners are not court documents, Petitioners can show no legally cognizable injury-in-fact stemming from their inability to access them. They do not seek any record of any testimony given before the grand jury, or any records of the grand jury's proceedings. ECF No. 1 at 26. They do not seek any documents prepared by the grand jury itself, such as the grand jury's report of its findings or the "presentments" it provided to the court in lieu of indictments. *See SGJ89-2*, 450 F.3d at 1163. These would be documents "created under the authority of the grand jury [that] remain at all times under the power of the court," *Carlson*, 837 F.3d at 760, over which the public would have a presumptive right to access—albeit subject to the secrecy provisions of Rule 6(e).

Petitioners do not argue that the documents they seek in this action are court documents. In fact, they argue that the documents are not even "matters occurring before the grand jury" subject to Fed. R. Crim. P. 6(e). ECF No. 1 at 27-28. Petitioners point to the Ninth Circuit's decision in *United States v. Dynavac, Inc.*, 6 F.3d 1407, 1412 (9th Cir. 1993), holding that pre-existing business records obtained via grand jury subpoena are never "matter[s] occurring before the grand jury" subject to the secrecy requirements of Fed. R. Crim. P. 6(e).[3] For the purposes of this motion, the Court need not resolve this question; the Ninth Circuit's position is not unanimous among the courts to have considered the issue. The material point is that in Petitioners' view, the materials they seek are no different from any other documents obtained by

[3] If, as Petitioners argue, the documents are not even subject to Rule 6(e), then the Petition—which is brought exclusively under Rule 6(e)—fails to state a claim for that reason as well.

the United States in the course of discovery. But if the documents are discovery materials, rather than "matters occurring before the grand jury," then there is no right of access, and no injury-in-fact arising from a denial of access. Because Petitioners have not alleged any legally protected or judicially cognizable interest in obtaining access to the documents, they have failed to articulate an injury-in-fact and to demonstrate that they have standing to bring this suit.

II. PETITIONERS FAIL TO STATE A CLAIM UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 6(e)(3)(E)(i).

Petitioners claim they are entitled to disclosure of the grand jury discovery documents under Federal Rule of Criminal Procedure 6(e)(3)(E)(i), which authorizes a court to unseal grand jury materials "preliminarily to or in connection with a judicial proceeding." To meet this standard, the party seeking disclosure must make a strong showing of a "particularized need" for the grand jury materials *See, e.g.*, *In re Special Grand Jury 89-2*, 143 F.3d 565, 570-71 (10th Cir. 1998). The Petition does not sufficiently allege a pending judicial proceeding or particularized need, and so fails to state a claim under Rule 6(e).[4]

[4] The Tenth Circuit has not addressed whether third parties—as opposed to the government, the defendant in a criminal case, or members of the grand jury itself—have the right to seek grand jury materials under Rule 6(e). Not all courts have so held. *See, e.g.*, *Finn v. Schiller*, 72 F.3d 1182, 1188 (4th Cir. 1996) ("[Rule 6(e)] by its clear language does not indicate that there is a right of private enforcement, and we find that such a right may not be implied."). Assuming *arguendo* that such a right exists, Petitioners have not alleged sufficient facts to state a claim. Moreover, the Tenth Circuit has not decided whether courts have inherent authority to unseal grand jury materials in circumstances other than those laid out in Rule 6(e), *see SGJ 89-2*, 450 F.3d at 1178, but Petitioners have limited their request to Rule 6(e), and have not made a request to unseal based on any inherent authority of the Court.

A. Petitioners Fail to Adequately Allege an Actual or Pending Judicial Proceeding.

Rule 6(e)(3)(E)(i) permits disclosure only "preliminarily to or in connection with a judicial proceeding." This provision "reflects a judgment that not every beneficial purpose, or even every valid governmental purpose, is an appropriate reason for breaching grand jury secrecy. Rather, the Rule contemplates only *uses related fairly directly to some identifiable litigation, pending or anticipated*." *United States v. Baggot*, 463 U.S. 476, 480 (1983) (emphasis added).

Petitioners do not meet this standard. The Petition recounts five "imminent threats at Rocky Flats," ECF No. 1 at 8-13, but this recitation does not mention a single lawsuit. Rather, these "threats"—disputes over the routing of roads and trails, the size of the proposed Visitor Center at the Rocky Flats Wildlife Refuge, and the permitting of oil and gas drilling near Rocky Flats—are simply areas in which Petitioners have some disagreement with governmental actions taken on or near Rocky Flats. Petitioners state repeatedly that they "oppose" these actions, *e.g.*, ECF No. 1 at 9, but do not allege that they have filed a lawsuit—or will be filing a lawsuit in the immediate future—to stop any of them. They allege that they "anticipate litigation will be required to oppose the imminent threats," and that "efforts short of litigation have not been fruitful." *Id.* at 25. But they give no details of what sorts of claims they anticipate bringing, in what courts, or against what defendants. Indeed, as to one of the "threats"—the issuance of state permits to explore for oil and gas near Rocky Flats—Petitioners admit that the permit requests at issue have been withdrawn. ECF No. 1 at 13.

By failing to plead the existence of "pending or anticipated" litigation, Petitioners provide no information that would permit the Court to evaluate whether the sought materials

"relate[] fairly directly to" the hypothetical lawsuits Petitioners might file. *Baggot*, 463 U.S. at 480. This failure renders Petitioners' claim under Rule 6(e) fatally flawed, and the Court should dismiss it for failure to state a claim.

B. Petitioners Do Not Sufficiently Allege Particularized Need.

Petitioners' failure to articulate a specific judicial proceeding for which the materials are required similarly dooms their attempt to show particularized need. To demonstrate particularized need, the materials sought must be "needed to avoid a possible injustice in another judicial proceeding," and the movant's request must be "structured to cover only materials so needed." *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 222 (1979).

As the Supreme Court recognized in *Baggot*, the particularized need inquiry "cannot even be made without consideration of the particulars of the judicial proceeding with respect to which disclosure is sought." 463 U.S. at 480 n.4. Petitioners do not plead "the particulars" of a single lawsuit, legal claim, or evidentiary circumstance showing it would be unjust to deny them access to the grand jury materials they seek. They generally assert that they need the documents to "identify and precisely locate hazardous substances on the Refuge property" and "to contradict the sampling protocol and risk assessment used to determine the overall site is 'safe.'" ECF No. 1 at 26. But they fail to explain how this inquiry will be relevant and admissible—let alone required to avoid injustice—in any particular judicial proceeding.

Similarly, Petitioners' request is not tailored to cover "only materials so needed" to avoid injustice in a judicial proceeding. *Douglas Oil*, 441 U.S. at 222. Petitioners seek "all public and business documents" provided to the grand jury, "either in response to a subpoena or through any other means." ECF No. 1 at 28. They make no effort to limit their request to documents related

to any claims made in any lawsuit, or even to the overall topic of where hazardous materials may have been released on the site. On its face, Petitioners blanket request encompasses materials far beyond simply those required "to avoid a possible injustice in another judicial proceeding." *Douglas Oil*, 441 U.S. at 222; *see also In re Grand Jury 95-1*, 118 F.3d 1433, 1437 (10th Cir. 1997) (finding no particularized need where movant did not know precise nature of grand jury materials sought and "was simply interested in engaging in a fishing expedition").

The public and third-party nature of the documents sought also suggests that Petitioners have not pleaded a particularized need for grand jury materials. Petitioners repeatedly admit that they seek only "public and business documents" prepared by Rockwell and its predecessor operators. ECF No. 1 at 2; *see also id.* at 26 ("Petitioners are seeking disclosure only of either public documents or documents created in the routine course of business by the managing contractors at Rocky Flats."). But the Petition does not allege why these "public" documents and "business records" of Rockwell are available *exclusively* via grand jury records. If the documents are truly public or created in the ordinary course of business by Rockwell, then Petitioners should be able to obtain them via the ordinary mechanisms of civil discovery in any lawsuit they file. At a minimum, in order to show "particularized need" for grand jury materials, Petitioners should be required to tell the Court why these documents are available only through the extraordinary step of unsealing grand jury records. Petitioners do not do so, and the Petition thus fails to sufficiently plead "particularized need."

To be sure, Petitioners recite the boilerplate text of the "particularized need" standard. *See, e.g.*, ECF No. 1 at 25 ("Petitioners have a particularized need to demonstrate harm that will result from the aforementioned imminent threats at Rocky Flats."). But these are precisely the

sort of "labels and conclusions" that federal courts are no longer to accept as true under *Iqbal* and *Twombly*. *See Khalik*, 671 F.3d at 1191 ("[M]ere 'lables and conclusions' and a 'formulaic recitation of the elements of a cause of action' will not suffice."). Petitioners have failed to plead evidentiary facts sufficient to justify their use of those "labels and conclusions," and their Petition thus fails to state a claim.

CONCLUSION

Because Petitioners lack Article III standing and because the Petition fails to state a claim upon which relief can be granted, the Petition should be dismissed.

Dated April 2, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following e-mail addresses:

pat@patmellenlaw.com

and I hereby certify that I will mail to the following non-CM/ECF participants in the manner (mail, hand delivery, etc.) indicated by the nonparticipant's name:

s/ Annette Dolce
U.S. Attorney's Office