

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO City and County Building 1437 Bannock Street, Room 256 Denver, Colorado 80202	<b>FILED Document</b> <b>CO Denver County District Court 2nd JD</b> <b>Filing Date: Nov 01 2012 04:08PM MDT</b> <b>Filing ID: 47510869</b> <b>Review Clerk: Sean McGowan</b>
<b>Plaintiff:</b> SCOTT GESSLER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE FOR THE STATE OF COLORADO, v. <b>Defendant:</b> DEBRA JOHNSON, IN HER OFFICIAL CAPACITY AS THE CLERK AND RECORDER FOR THE CITY AND COUNTY OF DENVER  Intervenor-Defendants: COLORADO COMMON CAUSE and GILBERT ORTIZ, in his official capacity as the Clerk and Recorder for the County of Pueblo	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p> <hr/> Case Number: 2011CV6588  Division/Courtroom: 203
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<b>DEFENDANT DEBRA JOHNSON'S MOTION FOR JUDGMENT ON THE PLEADINGS (Rule 12(c) and 12(h)(2))</b>	

Defendant Debra Johnson, in her official capacity as Clerk and Recorder for the City and County of Denver ("Denver"), through her undersigned counsel, respectfully submits this motion for judgment on the pleadings in Denver's favor pursuant to Rule 12(c) and 12(h)(2) on the First and Second Claims for Relief brought by Secretary of State Gessler ("Secretary") in his Complaint.

**A. Certificate Of Compliance**

Pursuant to C.R.C.P. 121, §1-15(8), counsel for movant certifies that she has conferred in good faith with adverse counsel for Plaintiff, prior to filing this motion, but the parties were unable to resolve their differences, thereby necessitating this motion.

**B. Pertinent Allegations In The Complaint**

1. The Secretary alleges C.R.S. 1-1-107(2)(d) as the sole basis for this Court's jurisdiction on all of his claims. (Complaint, ¶ 2). Section 1-1-107(2)(d) provides the exclusive remedy to resolve disputes, arising under the Uniform Election Code (the "Election Code"), between the Secretary and local election officials and is contained within the Secretary's powers provision of the Election Code.

2. For his first claim, the Secretary seeks a "declaration that the Clerk must follow the Secretary's order", citing C.R.S. 1-1-110(1). (Complaint, ¶ 27-30). Section 1-1-110 is the provision establishing powers of county clerks and recorders. This is also a citation to the Uniform Election Code.

3. For his second claim, the Secretary seeks a declaration that "election laws must be applied uniformly in each county in the State", citing 1-1-107(1)(c) and 1-1.5-101(g). Complaint, ¶ 31-34. The first is again a citation to the Secretary's provision in the Election Code. The second is a citation to a provision in the Election Code specific to the implementation of the federal Help America Vote Act of 2002.

#### **C. Statutory Interpretation of the Uniform Election Code (C.R.S. 1-1-107(2)(d))**

4. When construing a statute, the goal is to give effect to the intent of the legislature and adopt the construction that best effectuates the purposes of the legislative scheme. *People v. Yascavage*, 101 P.3d 1090 (Colo.2004). The courts first look to the plain and ordinary meaning of the statutory language to determine the legislative intent. *Holcomb v. Jan-Pro Cleaning Sys.*, 172 P.3d 888, 890 (Colo.2007), citing *People v. Cross*, 127 P.3d 71, 73 (Colo.2006). If the statutory language is clear, we apply the plain and ordinary meaning of the provision. *Turbyne v. People*, 151 P.3d 563, 568 (Colo.2007). The Courts do not add words to the statute or subtract words from it. *Holcomb*, 172 P.3d at 894; *Turbyne*, 151 P.3d at 568.

5. C.R.S. 1-1-107(2)(d) provides in pertinent part:

(2) In addition to any other duties prescribed by law, the secretary of state shall have the following powers: (d) To enforce the provisions of this code by injunctive action brought by the attorney general in the district court for the judicial district in which any violation occurs. [Emphasis added].

6. This is the only statement in the Uniform Election Code conferring on the Secretary the power to bring a court action against a local election official. It, by its express terms (see C.R.S. 1-1-107(2)(d)) only confers on the Secretary the power to seek injunctive relief. There is no authorization for a declaratory relief claim. Thus under the plain language of the statute, the Court should enter judgment on the pleadings in favor of Denver on the first claim for declaratory relief.

7. When the Colo. General Assembly has conferred special statutory remedies, such remedies supersede and serve as the sole and exclusive means to seek and obtain judicial relief. See, *Oxley v. Colo. River Water Conservation Dist.*, 513 P.2d 1062, 1064 (Colo. 1973). A party

cannot circumvent special statutory remedies for judicial review by attempting to obtain declaratory relief, where the prescribed avenue of review is adequate. *Clasby v. Klapper*, 636 P.2d 682, 684 (Colo. 1981); See also, *Hays v. Denver*, 254 P.2d 860, 862 (Colo. 1953); *Greyhound Racing Assoc. v. Colo. Racing Comm'n*, 589 P.2d 70, 71 (Colo. App. 1978). The Plaintiff's exclusive remedy to resolve his dispute with Denver is to seek injunctive relief; he is not entitled to additional remedies that are not contained in Section 1-1-107(2)(d).

**D. Statutory Interpretation of the Help America Vote Act (C.R.S. 1-1.5-107(1)(c))**

**8.** The same plain meaning rule of construction applies to C.R.S. 1-1.5-107(1)(c) concerning the Help America Vote Act. The provision contains no language giving the Secretary of State the power to file a declaratory relief action (or any action) against a local election official. See e.g. C.R.S. 1-1.5-104 (Detailing powers and duties of the secretary of state to ensure compliance by the State with the federal Help America Vote Act by undertaking activities such as providing education and training programs and maintaining a statewide voter registration system.). Again, under the plain language of C.R.S. 1-1.5-107(1)(c), the Court should enter judgment on the pleadings in favor of Denver on the second claim for declaratory relief.

**E. Standard For Deciding Motions Under C.R.C.P. 12(c)**

**9.** A grant of a motion for judgment on the pleadings under Rule 12(c), C.R.C.P. is a grant of judgment in favor of a party. Under C.R.C.P. Rule 12(c), any party may move for judgment on the pleadings after the pleadings are closed but within such time as not to delay the trial. Under C.R.C.P. 12(h)(2), a party may seek to dispose of a claim for failure to state a claim by, among other things, moving for judgment on the pleadings under C.R.C.P. 12(c) and it may be filed after the pleadings are closed. When filed after an answer, a defendant's motion to dismiss for failure to state a claim is properly addressed as a motion for judgment on the pleadings under C.R.C.P. 12(c). See *Sabell's, Inc. v. Flens*, 42 Colo. App. 421, 424, 599 P.2d 950, 952 (1979), *aff'd* 627 P.2d 750 (Colo.1981); see also 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §1357 at 408 (3d ed. 2004) (a post-answer Rule 12(b)(6) [the federal counterpart of C.R.C.P. 12(b)(5)] motion is untimely and the cases indicate that some other vehicle, such as a motion for judgment on the pleadings... must be used to challenge the plaintiff's failure to state a claim", citing cases.

**10.** The standard for judgment on the pleadings is "essentially consistent with that employed in resolving a motion to dismiss." See *Colorado Criminal Justice Reform Coalition v. Ortiz*, 121 P.3d 288, 294 (Colo.2005). See also *Branscum v. American Community Mut. Ins. Co.*, 984 P.2d 675 (Colo.App.1999) (standard of review for a motion for judgment on the pleadings is consistent with that for a motion to dismiss for failure to state a claim under C.R.C.P. 12(b)(5)).

**11.** In deciding the motion, the court "must construe the allegations of the pleadings strictly against the movant and must consider the allegations of the opposing party's pleadings as true." *Abts v. Board of Educ. of Sch. Dist. Re-1*, 622 P.2d 518, 521 (Colo.1980). See also *Schoen v. Morris*, 15 P.3d 1094 (Colo.2000) (when reviewing the trial court's dismissal of an

action for failure to state a claim, the appellate court applies the same standards as the trial court and accepts all averments of material fact as true and in the light most favorable to the plaintiff).

**12.** The motion should not be granted unless "the pleadings themselves show that the matter can be determined on the pleadings." *Strout Realty, Inc. v. Snead*, 35 Colo. App. 204, 530 P.2d 969, 970 (1975); *Colorado Criminal Justice Reform Coalition v. Ortiz*, 121 P.3d 288, 294 (Colo. App. 2005). The motion is not properly used "where material issues of fact are present which can only be determined from the testimony." *Koch v. Whitten*, 140 Colo. 109, 342 P.2d 1011, 1013 (1959). However, judgment on the pleadings is appropriate when the issue is the interpretation or analysis of a constitutional provision or statute, which presents purely a question of law. See, *Board of County Com'rs of Jefferson County v. City and County of Broomfield*, 62 P.3d 1086, 1091 (Colo. App. 2002).

**13.** This issue in this motion is a legal issue: whether the First and Second Claims for Relief brought by the Plaintiff are outside the scope of relief that may be provided by the Court under this special statutory proceeding. The motion should be granted because the pleadings show there is no legal basis for the Secretary's first and second claims for declaratory relief and the matter can be determined in favor of Denver on the basis of the Secretary's own allegations.

#### **F. Conclusion**

**14.** Here, Plaintiff's First and Second Claims for Relief do not contain material factual allegations which must be taken as true. The allegations assert legal arguments and contain conclusory statements, the correctness of which should be properly determined on a motion for judgment on the pleadings. For these reasons, as to the First and Second Claims for Relief, Denver requests an Order for judgment on the pleadings pursuant to C.R.C.P. 12(c). A proposed Order is attached for the Court's consideration.

Respectfully submitted this 1st day of November, 2012.

Attorneys for the Defendant Johnson

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*In accordance with C.R.C.P. 121§1-29(9), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.*

**CERTIFICATE OF SERVICE**

I hereby certify that on November 1, 2012, I provided a true and correct copy of the foregoing was served via LexisNexis Serve on:

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<p><b>Plaintiff:</b> Scott Gessler, In His Official Capacity As Secretary Of State For The State Of Colorado, V.</p> <p><b>Defendants:</b> Debra Johnson, In Her Official Capacity As The Clerk And Recorder For The City And County Of Denver, Colorado Common Cause, And Gilbert Ortiz, In His Official Capacity As Pueblo County Clerk And Recorder.</p> <p>Intervenors-Defendants: COLORADO COMMON CAUSE and GILBERT ORTIZ, in his official capacity as the Clerk and Recorder for the County of Pueblo</p>	
<p><b>ORDER</b></p>	

This matter came before the Court on Defendant Johnson's Motion for Judgment on the Pleadings (Rule 12(c) and 12(h)(2), and the Court being duly advised in the premises, now ORDERS AS FOLLOWS:

After having reviewed the pleadings and arguments, and the applicable portions of the record, for all the reasons set forth above, and the Court being fully advised in the premises, **IT IS HEREBY ORDERED** that the defendants' Motion for Judgment on the Pleadings (Rule 12(c) and 12(h)(2), is **GRANTED**.

**DONE AND ORDERED BY THE COURT THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2012:**

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**The Honorable Edward D. Bronfin**  
**2<sup>nd</sup> Judicial District Court Judge**