

DISTRICT COURT, PITKIN COUNTY, COLORADO Pitkin County Courthouse 506 East Main Street, Suite 300 Aspen, Colorado 81611	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
Plaintiff: MARILYN MARKS v. Defendant: KATHRYN KOCH	
Attorney for Plaintiff: Robert A. McGuire Robert A. McGuire, Attorney At Law, LLC 1624 Market Street, Suite 202 Denver, Colorado 80202 Phone Number: 303-734-7175 FAX Number: 303-734-7166 E-mail: ram@lawram.com Atty. Reg. #: 37134	Case Number: 2009CV294 Div.: 3 Ctrm.:
PLAINTIFF'S MOTION FOR AMENDMENT OF JUDGMENT PURSUANT TO C.R.C.P. 59(a)(4)	

The Plaintiff, Marilyn Marks, by and through her undersigned counsel, respectfully moves the Court pursuant to C.R.C.P. 59(a)(4), to reconsider its Order on Pending Motions entered on March 10, 2010, and to amend the judgment to vacate the Court's dismissal of the Complaint and to state instead that the Defendant's Motion to Dismiss is denied.

As grounds for this Motion, the Plaintiff states:

1. Pursuant to C.R.C.P. 121(c) § 1-15(8), counsel for Plaintiff hereby certifies that he has in good faith conferred with counsel for the Defendant about this Motion prior to filing it, and he is authorized to notify the Court that the Defendant opposes the relief sought herein.

2. On March 10, 2010, the Court entered its Order on Pending Motions, which granted the Defendant's Motion to Dismiss pursuant to C.R.C.P. 12(b)(5) for failure to state a claim upon which relief can be granted.

3. The Order on Pending Motions held that the Plaintiff's Complaint was inadequate under C.R.C.P. 12(b)(5) because a Colorado Open Records Act (CORA) inspection of 2,544 digital photographs of ballots (TIFF files) would be contrary to state law and that the law therefore offers the Plaintiff no relief under the facts alleged in the Complaint. See Order ¶ 13.

4 Pursuant to C.R.C.P. 59(a), this Motion has been timely filed within 15 days of entry of the Order on Pending Motions on March 10, 2010.

Article VII, Section 8, of the Colorado Constitution

5. The Order identifies Article VII, Section 8, of the Colorado Constitution as a state law that is contrary to allowing a CORA inspection of the TIFF files. The Court held that this constitutional provision's requirement for preservation of "secrecy in voting" would be violated if the TIFF files were subject to public inspection under CORA. See Order ¶¶ 8-9, 12.

6. The Plaintiff respectfully submits that the allegations of the Complaint, viewed in the light most favorable to the Plaintiff, are incompatible with the Court's conclusion that constitutional secrecy in voting would be violated as a matter of law by a CORA inspection of the TIFF files.

7. In evaluating the Defendant's Motion to Dismiss for failure to state a claim, the Court must accept all averments of material fact set out in the Complaint as true, and those allegations must be viewed in the light most favorable to the Plaintiff. See *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909 (Colo. 1996). In ruling on the Motion to Dismiss, the Court may consider only matters stated in the complaint and must not go beyond the confines of the pleading. See *Ashton Properties, Ltd. v. Overton*, 107 P.3d 1014 (Colo. App. 2004).

8. As the Court notes in Paragraph 2 of the Order, the Complaint alleges the material fact that the TIFF files are "digital photographic image[s]" of original paper ballots.¹ See Compl. ¶¶ 15, 25, 33.

9. Importantly, the Complaint also alleges the material fact that the paper ballots, from which the TIFF files were created, are *anonymous*. See Compl. ¶¶ 1, 33.

10. The allegation that the ballots are anonymous, like all other material allegations in the Complaint, must be regarded as true under *Dorman*, 914 P. 2d at 909. When viewed in the light most favorable to the Plaintiff, the allegation that the paper ballots are anonymous

¹ The TIFF files now sought by the Plaintiff were created as scans of paper ballots, see Compl. ¶ 15, and are currently in the Defendant's possession on a disk, see Compl. ¶ 32. It bears noting, however, that the particular TIFF files on the disk in the Defendant's custody are not the only TIFF files that were created from the same ballots. Rather, the particular TIFF files sought here are simply *copies* of TIFF files that were created and stored somewhere else (i.e., on a different computer storage medium than the Defendant's disk) during the ballot scanning process. This Court's ruling that TIFF files are *de jure* equivalents of ballots and therefore are subject to all the requirements of Section 31-10-616(1), C.R.S., will have implications not just for the legal status of the particular TIFF files sought by the Plaintiff in this CORA case, but also for *all* of the identical TIFF files ever created and prematurely destroyed or otherwise duplicated and maintained outside of the ballot box after the election.

necessarily implies that the TIFF files, as digital photographic images of those same paper ballots, must also be anonymous.

11. Because secrecy in voting cannot be violated by a CORA inspection of anonymous images of anonymous ballots, Article VII, Section 8, of the Colorado Constitution does not support dismissal of the Complaint pursuant to C.R.C.P. 12(b)(5) under the facts alleged.

Uniform Photographic Copies of Business and Public Records as Evidence Act

12. To the extent the Court relies upon the Uniform Photographic Copies of Business and Public Records as Evidence Act (the UPCBPREA), §§ 13-26-101 to -104, C.R.S., to justify subjecting TIFF files to the requirements that Section 31-10-616(1), C.R.S., imposes upon “ballots,” see Order ¶ 11, the Plaintiff respectfully suggests that the Court has misapplied the UPCBPREA.

13. Ballots are properly regarded as instruments that inherently possess independent legal significance, cf. *Board of County Comm'rs v. O'Dell*, 920 P.2d 48, 51 (Colo. 1996), which significance cannot be imparted to a mere copy of the instrument. A ballot’s legal status is inherent in the tangible physical form of the instrument, which is why not only the content and layout but also the required physical characteristics of paper ballots are prescribed with specificity in Sections 31-10-902(1) to -902(3), C.R.S.

14. The UPCBPREA was adopted by Colorado in 1955. Its text was drawn from the text of the model Uniform Photographic Copies of Business and Public Records as Evidence Act drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL).

15. The purpose of the UPCBPREA, like the purpose stated by the NCCUSL for the model act, was limited to providing “legislative sanction for the use of photographic records as evidence.” See American Bar Association, “Uniform Photographic Copies of Business and Public Records as Evidence Act” (Sept. 8, 1949).

16. The UPCBPREA cannot properly be interpreted to transform the TIFF files into the equivalents of paper ballots for any purpose other than the purpose of establishing evidentiary admissibility. UPCBPREA cannot endow copies of ballots with the same independent legal significance that is otherwise inherent in actual ballots themselves.

17. If UPCBPREA did apply to the TIFF files as the Court has interpreted it to apply, then the televised images of ballots that were shown by Grassroots TV on election night and recorded in digital video (i.e., by “photographic ... or other process which accurately reproduces or forms a durable medium for reproducing the original,” see § 13-26-102, C.R.S.),² would also be the legal equivalents of ballots and, like ballots and TIFF files, would have to be preserved in the ballot box and destroyed consistently with the requirements of Section 31-10-616(1), C.R.S.

² See Compl. ¶¶ 26, 29-30.

18. The Plaintiff asks the Court to reconsider and reverse its holding that the UPCBPREA subjects the TIFF files to the requirements of Section 31-10-616(1), C.R.S., as though the TIFF files were themselves “ballots.” The term, “ballots,” and the related requirements of Section 31-10-616(1) should be interpreted to apply only to the original paper ballots themselves. The TIFF files are properly regarded as constituting “other official election records,” which are to be preserved according to the requirements of Section 31-10-616(2), C.R.S., rather than the requirements of Section 31-10-616(1).

Section 31-10-616(1), C.R.S.

19. The Order identifies Section 31-10-616(1), C.R.S., as a state law that is contrary to allowing a CORA inspection of the TIFF files. See Order ¶¶ 7, 9, 12-13.

20. Section 31-10-616(1), C.R.S., states in pertinent part that the “ballots,” except for removal during an election contest, “shall remain in the ballot box” until their destruction.

21. Even if the TIFF files are the equivalents of “ballots” for purposes of Section 31-10-616(1), C.R.S., which the Plaintiff disputes for the reasons that include those set out in Paragraphs 12-18, *supra*,³ the Plaintiff respectfully suggests that the Court has misapplied Section 31-10-616(1) in holding that “contest proceedings” are the *only* circumstance in which ballots may be accessed after an election, see Order ¶ 9.

22. Recounts of Title 31 elections are provided for in Section 31-10-1207, C.R.S.

23. A recount may be triggered automatically, see § 31-10-1207(1), C.R.S., or it may be conducted at the request of any interested party, see § 31-10-1207(2), C.R.S.

24. Recounts are distinct from election contests, which are governed by a separate Part of Title 31. See §§ 31-10-1301 to -1308, C.R.S.

25. Aspen’s election used paper ballots. Under Section 31-10-1207(5), C.R.S., “[i]n precincts using paper or electronic ballots, the recounts shall be *of the ballots cast...*” (emphasis added).

26. Any recount “of the ballots cast” necessarily requires the removal of those ballots from the ballot box, despite the fact that removal for recounts is not stated in Section 31-10-616(1), C.R.S., to be an exception to the non-removal requirement.

27. It is therefore plain from Title 31’s inclusion of provisions regarding recounts that contest proceedings *cannot* be the only exception to the non-removal requirement.

³ The Plaintiff also wishes to emphasize here that the Complaint does not allege that the TIFF files are, in fact, accurate representations of the original paper ballots.

28. Just as recounts are permissible without an exception expressly stated in Section 31-10-616(1), C.R.S., so, too, are CORA inspections permissible without an expressly stated exception for CORA. The Plaintiff accordingly asks the Court to reconsider and reverse its holding that Section 31-10-616(1) prohibits CORA inspection of the TIFF files.

Substantial Compliance Standard

29. The Plaintiff respectfully suggests that the Court has given Section 31-10-616(1), C.R.S., an overly literal construction, when the correct judicial standard for determining what acts satisfy the requirements of Title 31, Article 10, requires only substantial compliance.

30. The Court is directed by the statute to resolve controversies over Title 31's requirements "with a view to obtaining a *substantial compliance with the provisions of this article...*" See § 31-10-1401, C.R.S. (emphasis added).

31. A determination of whether substantial compliance has been satisfied requires the Court to consider "(1) the extent of the ... noncompliance ..., (2) the purpose of the provision violated and whether that purpose is substantially achieved despite the ... noncompliance, and (3) whether [a good faith effort to comply can be reasonably inferred]." *Cf. Bickel v. City of Boulder*, 885 P.2d 215, 227 (Colo. 1994).

32. Here, the extent of noncompliance with Section 31-10-616(1), C.R.S., that would be caused by allowing a CORA inspection of the TIFF files is minimal or non-existent. The disk containing TIFF files may be removed from the ballot box, copied to a new disk and then immediately replaced in the ballot box.

33. To the extent that the purpose of Section 31-10-616(1), C.R.S., may be to protect the physical integrity or security of the TIFF files or of paper ballots, that purpose would not be adversely affected by a CORA inspection of the TIFF files. The temporary removal of the disk containing TIFF files from the ballot box for purposes of copying the TIFF files onto an inspection disk would have no effect on the integrity or security of the ballots or of the disk containing the TIFF files.

34. To the extent that the purpose of Section 31-10-616(1), C.R.S., may be to preserve anonymity of the paper ballots, that purpose would be completely unaffected by a CORA inspection of the TIFF files. As discussed in Paragraphs 9-11, *supra*, the TIFF files are created from ballots that have been alleged to be and therefore, for purposes of resolving the Defendant's Motion to Dismiss, must be accepted by the Court to be anonymous.

35. In its Order, the Court has adopted a loose construction of the term, "ballots," side by side with a literal construction of the non-removal requirement. The Plaintiff respectfully urges that this inconsistent approach to construing terms within a single statutory provision should be reconsidered in favor of applying the substantial compliance standard, and that the Court should therefore hold that allowing a CORA inspection of the TIFF files can and does constitute substantial compliance with the requirements of Section 31-10-616(1), C.R.S.

Legislative History of Section 31-10-616(1), C.R.S.

36. The Plaintiff respectfully submits that the Court should consider the legislative history of Section 31-10-616(1), C.R.S., before applying that statute to the TIFF files in this case.

37. Much of the substance of Section 31-10-616(1), C.R.S., antedates modern methods of voting, including the use of the constitutionally required anonymous ballot. See 1879-1885 Colo. Sess. Laws 186-87.

38. The legislative history of Section 31-10-616(1), C.R.S., suggests that the statute was originally intended by the General Assembly to prohibit access to ballots at a time when ballots were required by the Colorado Constitution to be individually identifiable. See Colo. Const. 1877 art. VII, § 8 (“All elections by the people shall be by ballot; every ballot voted shall be numbered in the order in which it shall be received, and the number be recorded by the election officers on the list of voters opposite the name of the voter who presents the ballot.”)

39. The Colorado Constitution was amended in 1946 to prohibit the marking of ballots in any way that made them identifiable, yet Section 31-10-616(1)’s language remained largely unchanged even after this change in voting methods. See § 31-10-616(1), C.R.S.

40. Section 31-10-616(1), C.R.S., is now obsolete to the extent its specific provisions are designed to protect the anonymity of the ballot in connection with voting methods that are no longer in use or constitutionally permitted in Colorado. The Court should interpret the statute with reference to this legislative history and should hold that Section 31-10-616(1) does not properly prohibit a CORA inspection of anonymous TIFF files.

WHEREFORE, the Plaintiff respectfully asks that the Court grant this Motion pursuant to C.R.C.P. 59(a)(4) to reconsider its Order on Pending Motions entered on March 10, 2010, and to amend the judgment to vacate the Court’s dismissal of the Complaint and to state instead that the Defendant’s Motion to Dismiss is denied.

Respectfully submitted this 24th day of March, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March, 2010, I served a true and correct copy of the foregoing **PLAINTIFF'S MOTION FOR AMENDMENT OF JUDGMENT PURSUANT TO C.R.C.P. 59(a)(4)** by the method indicated below to each of the following:

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