

District Court, Saguache County, Colorado Court Address: 501 Christy P.O. Box 197 Saguache, CO 81149	FILED Document CO Saguache County District Court 12th JD Filing Date: Mar 31 2011 4:13PM MDT Filing ID: 36798982 Review Clerk: Darlene Mellott
SCOTT GESSLER, in his official capacity as Secretary of State of the State of Colorado, Plaintiff, v. MELINDA MYERS, in her official capacity as Clerk and Recorder for the County of Saguache, Defendant.	<hr/> <p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> Case Number: 2011CV9 Div.: Ctrm:
<hr/> Attorney for Defendant Melinda Myers: Benjamin F. Gibbons BENJAMIN F. GIBBONS, P.C. 800 1 st Avenue Monte Vista, CO 81144 Phone Number: (719) 852-4731 FAX Number: (719) 852-4732 E-mail: gibbonslaw@amigo.net Atty. Reg. #: 17815	
DEFENDANT MELINDA MYERS' ANSWER TO COMPLAINT	

COMES NOW, Defendant Melina Myers, in her official capacity of Clerk and Recorder of Saguache County, by and through her counsel, Benjamin F. Gibbons, Saguache County Attorney, and as her Answer to the Complaint, states and alleges as follows:

I. ANSWER

1. Defendant Myers admits to the allegations contained in paragraphs 1 and 2 of the Complaint as to the jurisdiction and venue of this action.
2. Defendant Myers admits that the recitation of the statutes as they relate to the designation and authority of the parties in paragraphs 2 and 3 of the Complaint are accurate.
3. Ms. Myers admits to the allegations contained in paragraph 4 of the Complaint as to her designation and role as chief election official for Saguache County. Ms. Myers responds to the allegation that she is required to follow the rules and procedures promulgated by the Secretary, pursuant to §1-1-110(1), C.R.S. by acknowledging that she has a duty to follow legal rules and orders promulgated by the Secretary.
4. Defendant Myers admits that allegations contained in paragraph 5 of the Complaint is an accurate summary of the authority delegated to the Plaintiff by §1-1-107(1)(a)-(c), C.R.S.

5. Defendant Myers admits that the allegations contained in paragraph 6 of the Complaint is an accurate summary of §1-1-107(2)(b),(d), C.R.S.

6. Ms. Myers responds to the allegations contained in paragraph 7 of the Complaint by stating that she is aware that the Secretary of State's Office received complaints about the conductance of the 2010 primary and general elections and that the Secretary's office had a staff member present in Saguache during the 2010 general election.

7. Defendant specifically denies the allegation contained in paragraph 8 of the Complaint that she or her staff ever altered any ballot and that affirmatively states that there was not a "confirmation" made of this allegation by the Secretary's office. Ms. Myers further states that a video surveillance system was in place and that the post-election audit was conducted in good faith reliance on advice from the Secretary's office.

8. Ms. Myers answers the allegations contained in paragraph 9 of the Complaint by acknowledging that she is aware of canvass board members notifying the Secretary of State's office of complaints relating to the general election. Defendant is not sure what the term "direct oversight of the elections" relates to the canvass board in the context of this action.

9. The Defendant answers the allegations contained in paragraph 10 of the Complaint by acknowledging that the Secretary has informed her of his intentions to conduct a "hand review" of voted ballots from three contests. Ms. Myers affirmatively states that she has agreed to have the Secretary of State's Office review the practices and procedures of the Clerk's office as it relates to the election. That offer was made prior to the filing of this action.

10. Defendant Myers answers the allegations contained in paragraph 11 of the Complaint by stating that she did initially agree to permit election officials and members of the Plaintiff's office to review the voted ballots.

11. Defendant answers the allegations contained in paragraph 12 of the Complaint by stating that she informed the Plaintiff that she would not agree to his revised demands that members of the public be permitted to inspect the voted ballots. Defendant affirmatively states that such practice would violate the confidentiality historically afforded a voted ballot in Colorado. Ms. Myers affirmative states that she did not refuse to permit the Secretary to inspect and review the practices and procedures of the Clerk's office.

12. Ms. Myers was not part of the March 11, 2011 telephone conversation and does not have sufficient information or belief to admit or deny the allegations contained in paragraph 13 of the Complaint.

13. Defendant Myers admits to the allegations contained in paragraph 14.

14. Ms. Myers answers the allegations of paragraph 15 of the complaint by stating that she did not deny the requested inspection and review of "practices and procedures", but only the requested "hand review" of voted ballots.

15. Ms. Myers denies the allegation contained in paragraph 16 of the Complaint and affirmatively states that the Secretary's power to inspect and review is limited to such authority and areas that have been specifically delegated by the State legislature.

16. Defendant answers the allegations of paragraph 17 by stating that she does not have the authority to prevent the Secretary of State from reviewing the practices and procedures of the Clerk's office as they relate to elections, but that she does have the power to prevent the Secretary of State from conducting a "hand review" of voted ballots as such an action is beyond the scope of authority of the Secretary under the circumstances of this action.

17. Defendant answers the allegations of paragraph 18 by stating that she does not have the authority to prevent the Secretary of State from reviewing the practices and procedures of the Clerk's office as they relate to elections, but that she does have the power to prevent the Secretary of State from conducting a "hand review" of voted ballots as such an action is beyond the scope of authority of the Secretary under the circumstances of this action.

18. Ms. Myers denies the allegations contained in paragraph 19 of the Complaint.

19. Paragraph 20 requires neither an admission nor denial.

20. Defendant Myers admits to the allegations of paragraph 21 of the Complaint to the extent they state or imply that the Clerk must comply with a legal order of the Secretary.

21. Ms. Myers denies the allegation contained in paragraph 22 of the Complaint.

22. Paragraph 23 requires neither an admission nor denial.

23. Defendant admits that the Secretary has the authority to inspect and review the practices and procedures of the Clerk's office as it relates to elections. Ms. Myers affirmative states that "practices and procedures" do not include voted ballots under the circumstances of the current action.

24. Ms. Myers answers the allegations of paragraph 25 of the Complaint by stating that an injunction is not required as that she has agreed to permit the Secretary to review her "practices and procedures" as they relate to elections.

25. The Defendant denies each and every allegation contained in Plaintiff's complaint except as specifically admitted herein.

II. AFFIRMATIVE DEFENSES

Defendant Melinda Myers asserts the following affirmative defenses:

1. The Plaintiff's Complaint fails to state a claim upon which relief can be granted against Defendant Myers.

2. Plaintiff's claims are barred or limited by the doctrines of waiver and estoppel. Specifically, the Secretary's office reviewed the practices and procedures of the Clerk on November 15 and 16, 2010 as part of the November 2, 2011 election process.
3. Plaintiff's claims are barred by any and all applicable statute of limitations.
4. The Defendant, in her role as the County Election Official, has an affirmative duty, pursuant to Article VII, Section 8 of the Colorado Constitution not to inquire or disclose how an elector voted and the proposed "hand review" of voted ballots may violate that duty.
5. Ms. Myers has an affirmative duty pursuant to §1-7-802, C.R.S. to preserve the election records for a period of at least twenty-five months after the election and the proposed procedure by the Secretary may interfere with that duty.
6. There is no existing "contested election", as set forth in the election code (§1-11-201 et. seq., that would permit the counting or examination of voted ballots as anticipated under Article VII, Section 8 of the Colorado Constitution.
7. The proposed "hand review" of the voted ballots exceeds the authority delegated by the State Legislature to the Secretary and the authority of that office is limited to those powers specifically enumerated in applicable statutes. While "practices and procedures" are specifically stated as being subject to inspection under §1-1-107(2)(b), C.R.S., that section does not give the Secretary the specific power to inspect voted ballots.
8. Defendant Myers reserves the right to add additional defenses, affirmative or otherwise, upon completion of discovery and investigation.

WHEREFORE, the Defendant having fully answered all the Plaintiff's claims and requests for relief, prays that the same be dismissed, with prejudice and that the Court award Defendant her costs and reasonable attorney fees incurred as a result of answering this Complaint and such other and further relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED this 31th day of March, 2011.

BENJAMIN F. GIBBONS, P.C.

By: /s/ Benjamin F. Gibbons
Benjamin F. Gibbons, #17815
Attorney for Melinda Myers in her
Capacity as Saguache County Clerk and Recorder

CERTIFICATE OF MAILING

I hereby certify that on 31st day of March, 2011 I sent via lexisnexis a true and correct copy of the above Defendant Melinda Myer's Answer to Complaint to the following:

John W. Suthers, Attorney General
Maurice G. Knaizer, Deputy Attorney General
1525 Sherman Street, 7th Floor
Denver, CO 80203

/s/ Fawn Samora_____