

<p>DISTRICT COURT, ADAMS COUNTY, STATE OF COLORADO</p> <p>Adams County Justice Center 1100 Judicial Center Drive Brighton, CO 80601</p>	<p>DATE FILED: July 11, 2014 7:53 AM FILING ID: 5ED865A487DD5 CASE NUMBER: 2013CV32572</p>
<p>REBECCA BRINKMAN and MARGARET BURD, et al., Plaintiffs,</p> <p>v.</p> <p>KAREN LONG, et al. , Defendants,</p> <p>and</p> <p>G. KRISTIAN MCDANIEL-MICCIO and NAN MCDANIEL-MICCIO, et al., Plaintiffs,</p> <p>v.</p> <p>STATE OF COLORADO, et al., Defendants.</p>	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p> <hr/> <p>Case Number: 13 CV 32572</p> <p>(Consolidated with Denver District Court Case No. 14-CV-30731)</p> <p>MDL Case No. 14- MD-\$</p> <p>Division: C</p>
<p>Wendy J. Shea, #26253 Assistant City Attorney Denver City Attorney's Office, Litigation Section 201 West Colfax Ave., Dept. No. 1108 Denver, CO 80202-5332 Telephone: (720) 913-3100 Facsimile: (720) 913-3182 E-mail: wendy.shea@denvergov.org <i>Attorneys for Defendant Debra Johnson, in her official capacity as Clerk and Recorder for the City and County of Denver</i></p>	
<p style="text-align: center;"><b>OBJECTION TO EMERGENCY MOTION FOR INJUNCTION AND REQUEST FOR DISMISSAL OR REASONABLE OPPORTUNITY TO RESPOND TO MOTION</b></p>	

Defendant, Debra Johnson, in her official capacity as the Clerk and Recorder for the City and County of Denver, by and through her attorney, Wendy J. Shea, Assistant City Attorney for

the Denver City Attorney's Office, objects to the Emergency Motion for Injunctive Relief filed by Defendant State of Colorado and requests that this Court either deny or dismiss the State's Motion or, in the alternative, grant her a reasonable opportunity to respond to the same prior to making any determination regarding the injunctive relief the State is seeking.

**AS GROUNDS THEREFOR**, Denver states:

After losing its Motion for a Temporary Restraining Order and Preliminary Injunction it sought against the Boulder County Clerk for the issuance of marriage licenses to same-sex couples, the State now claims that an "emergency" exists in this case allegedly based upon the stay this Court entered on its Summary Judgment Order and filed a motion pursuant to C.R.C.P. 62(c) seeking to have this Court enjoin the Denver County Clerk from issuing such marriage licenses. However, the State cannot demonstrate that it is entitled to injunctive relief under Rule 62(c) and the circumstances which exist in this case.

The State argues that relief pursuant to C.R.C.P. 62(c) is necessary "to effectuate this Court's Order...including a stay pending resolution on appeal." (*Emergency Motion for Injunction*, at p. 1.) However, the plain language of Rule 62(c) demonstrates that it has no application to the matter before this Court. Specifically, Rule 62(c) provides:

**Injunction Pending Appeal.** *When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction*, the trial court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

(emphasis added); *see also Rivera v. Civil Service Comm'n of the City and County of Denver*, 529 P.2d 1347, 1348 (Colo. App. 1974) (noting that C.R.C.P. 62(c) expressly authorizes a trial court to modify the terms of an injunction during the pendency of an appeal of the injunctive

order). In this case, there is no question that the Court's Summary Judgment Order did not grant, dissolve or deny an injunction. *See Summary Judgment Order*, p. 45. The State has failed to demonstrate it is entitled to seek injunctive relief against Denver in this case. For this reason alone, this Court should deny or summarily dismiss the State's Motion.

Additionally, in its Motion, the State has failed to demonstrate that this Court has sufficient jurisdiction to issue the injunctive relief it is seeking and that an emergency actually exists necessitating that Denver be immediately enjoined from issuing marriage licenses to same-sex couples. In fact, the State's claim that "an immediate, emergency injunction" is necessary to prevent the Denver County Clerk from allegedly continuing to act "directly contrary to this Court's decision to issue a stay" is simply unfounded. The issuance of unauthorized marriage licenses was not litigated as part of this case and, as a result, the issue was not addressed by this Court's Summary Judgment Order or in Motion filed to request a stay of the judgment pending appeal or the oppositions filed thereto. *See, e.g., Rivera*, 529 P.2d at 1348 (recognizing that Rule 62(c) does not give the trial court the authority to enter an order which alters the rights granted or created by the original order). In fact, in direct contradiction to the position it is now attempting to assert in the Motion filed with this Court, the State itself highlighted this very distinction in the Reply Brief filed in support of its Motion for Preliminary Injunction in the Boulder County District Court:

This request for a preliminary injunction raises important questions about the rule of law in Colorado. It does not, however, raise the undeniably important question of whether same-sex couples have constitutional rights to marriage. Conflating these issues, Clerk Hall justifies her disobedience of state law (and the Colorado Constitution) by predicting that same sex-couples will ultimately prevail in establishing a federal constitutional right to same-sex marriage. This is the wrong legal question for this court to consider. That issue is currently being litigated in both state and federal court, where it will be properly resolved under our court

system. The question here is whether, before the judicial system reaches that resolution, Clerk Hall has the discretion to ignore state law. The law on this question is resoundingly against Clerk Hall's un-authorized [sic] issuance of licenses.

*Exhibit A, State of Colorado Reply in Support of Preliminary Injunction*, p. 1-2 (emphasis added). Here, by its own admission, the State is now attempting to conflate the issue which the Court decided here on summary judgment - that the challenged marriage bans are unconstitutional - with an issue which was **never** before this Court - whether the Denver County Clerk, like the Boulder County Clerk, may issue marriage licenses to same-sex couples. The State cannot simply ignore the jurisdictional issues raised by its Motion<sup>1</sup> and claim that an "emergency" exists in this case which requires the immediate issuance of injunctive relief merely because the Denver County Clerk, like the Boulder County Clerk, has decided that the public interest in upholding the constitutional rights of same-sex couples outweighs any remaining interest in abiding by state law.

Rather, pursuant to C.R.C.P. 65(b), a temporary restraining order may be granted without written or oral notice of the adverse party only if:

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<sup>1</sup> In its Motion, the State attempts to circumvent the entire jurisdictional issue by referring to dicta contained in a concurring opinion in *Arapahoe County Pub. Airport Auth. v. Centennial Express Airlines, Inc.*, 956 P.2d 587, 599 (Colo. 1998) (Scott, J. concurring and specially concurring). In his concurrence, Justice Scott referred to cases in which the Colorado Supreme Court previously held that if a court does not have jurisdiction to decide a controversy on the merits, it may issue an injunction to preserve the status quo pending arbitration. *Id.* However, the majority opinion does not reach this conclusion nor do the cases which Justice Scott cites in his concurrence. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. District Court for the City and County of Denver*, 672 P.2d 1015, 1018 (Colo. 1983) (recognizing that a court has the power to preserve status quo in the arbitration context and noting that preliminary relief is particularly appropriate where arbitration may be futile if the status quo is not preserved pending the arbitrator's determination); *Hughley v. Rocky Mtn. Health Maint. Org., Inc.*, 927 P.2d 1325, 1330 (Colo. 1996) (court may entered injunction to preserve status quo despite statutory divestiture of jurisdiction over merits of dispute submitted to arbitration). The State has not cited any case supporting the proposition that a court may enter an injunction on an issue which was not litigated or considered as part of a final judgment.

- (1) It clearly appears from specific facts shown by affidavit or by the verified complaint or by testimony that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and
- (2) the applicant's attorney certifies to the court in writing or on the record the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required.

The State has unquestionably failed to meet this burden. The Motion is not supported by affidavit, nor has there been a hearing in which the state presented testimony demonstrating that immediate and irreparable injury, loss, or damage will result before the Denver Clerk may be heard in opposition. In fact, the State has already demonstrated its inability to establish immediate and irreparable injury in the Boulder County District Court case. This failure confirms that the State is not entitled to an emergency injunction against the Denver County Clerk.

Finally, in addition to the issue of whether this Court has jurisdiction to enjoin Denver from issuing marriage licenses to same-sex couples, other very significant issues exist which Denver should be allowed to raise for this Court's consideration prior to any determination being made concerning injunctive relief. Such issues include the State's inability to demonstrate irreparable harm, how the balance of the equities favor Denver's position, how enjoining Denver from issuing marriage licenses would disserve the public interest, especially in light of the decision issued by the Boulder County Court and the fact that at least one other county in addition to Boulder and Denver has decided to start issuing marriage licenses and the existence of an adequate remedy at law for the State, especially in light of the steps the Denver Clerk has taken to protect those affected by its decision to proceed with the issuance of same-sex marriage licenses.

**WHEREFORE**, for all of these reasons, Debra Johnson, in her official capacity as the Clerk and Recorder for the City and County of Denver, respectfully requests that the Court either deny or dismiss the State’s Motion for emergency injunctive relief or, in the alternative, grant her a reasonable amount of time to fully respond to the Motion prior to reaching any decision regarding the injunctive relief the State seeks.

Dated this 11th day of July, 2014.

Respectfully submitted,

By:                   s/ Wendy Shea                    
Wendy J. Shea  
Denver City Attorney’s Office  
*Attorney for Defendant Debra Johnson*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 11th day of July, 2014, the foregoing **OBJECTION TO EMERGENCY MOTION FOR INJUNCTION AND REQUEST FOR DISMISSAL OR REASONABLE OPPORTUNITY TO RESPOND TO MOTION** was filed with the Court and will be served on all counsel of record via ICCES.

                  s/ Wendy Shea                    
Denver City Attorney’s Office