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STATE OF MINNESOTA  
COUNTY OF RAMSEY

**FILED**  
Court Administrator

FEB 25 2009

By  Deputy

DISTRICT COURT  
SECOND JUDICIAL DISTRICT

Court File No. 62-CV-09-56

In the Matter of the contest of General  
Election held on November 4, 2008, for the  
purpose of electing a United States Senator  
from the State of Minnesota,

Cullen Sheehan and Norm Coleman,

Contestants,

v.

Al Franken,

Contestee.

**CONTESTANTS' MOTION  
TO STRIKE CERTAIN  
AMENDED COUNTERCLAIMS**

**INTRODUCTION**

Contestee sought leave to amend his Counterclaims to modify his claims with respect to rejected absentee ballots. Contestants did not oppose that request but preserved their right to seek to add additional ballots in the same categories. When Contestee filed his Amended Answer and Counterclaims on February 21, 2009, however, he added an entirely new counterclaim and modified another—neither of which relate to rejected absentee ballots. These new claims are not within the scope of what he sought permission to do and come so late in the proceedings that Contestants would be unfairly

and substantially prejudiced by permitting Contestee to pursue them. The Court accordingly should strike them.<sup>1</sup>

### ARGUMENT

Contestee's motion to amend sought leave only to interject additional rejected absentee ballots and to "clean up" his pending counterclaims regarding the ballots he had previously asked the Court to count. It did not seek leave to assert any other new claims. Nor did the Court grant such leave.

The Amended Answer and Counterclaims goes well beyond modifying Contestee's claims regarding rejected absentee ballots. His Third Counterclaim, which relates to duplicate/original ballot issues, has been broadened to apparently include more than the precincts previously stated in that claim (when it was denominated the Fourth Counterclaim). His Fourth Counterclaim, which asserts a chain of custody claim to disenfranchise some 61 voters in Becker County, is entirely new.

The Court was not asked for leave to assert these claims—Contestee just did it, without permission and without notice. The Court should not permit these unauthorized amendments and new claims. *See* Minn. R. Civ. Pro. 15.01 (requiring leave of court or written consent of the adverse party for amendment of pleadings).

Although Rule 15.01 encourages a liberal policy, an amendment at this stage of the proceedings—four full weeks into trial—is utterly unjustified and would cause substantial prejudice to Contestants. *See Chan v. Katzenmeyer*, 391 N.W.2d 907, 908

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<sup>1</sup> Contestants met and conferred with Contestee but were unable to resolve this issue.

(Minn. App. 1986) (while acknowledging that Rule 15.01 normally contemplates liberal amendment of the pleadings, general rule only applies when amendment works no substantial prejudice on opposing party); *W.V. Nelson Const. Co. v. City of Lindstrom*, 1998 WL 566801, \*2 (Minn. Ct. App. Sept. 8, 1998) (same). A motion to amend made at a late stage in the proceedings should be denied when it would cause delay or prejudice to the opposing party. *Shea v. Hanna Mining Co.*, 397 N.W.2d 362, 370 (Minn. Ct. App. 1986); *Johnson v. Opportunity Workshop, Inc.*, 1998 WL 328385, \*1 (Minn. Ct. App. 1998).

If the Court were to allow Contestee to go forward with these covertly added new claims, Contestants would be unfairly prejudiced at this late stage in the proceedings. “It is fundamental that lack of notice as to the full extent and nature of [a party’s] claims . . . may infringe on [the opposing party’s] preparation of an adequate defense and, therefore result in prejudice.” *Nkwonkam v. Courtyard Apartments*, 2006 WL 1529403, \* (Minn. Ct. App. 2006) (citing Rule 15.01). *See also Dale v. Pushor*, 75 N.W.2d 595, 601 (Minn. 1956) (affirming trial court’s denial of motion to amend during trial where would have had to gather and prepare new evidence); *Bebo v. Delander*, 632 N.W.2d 732, 741 (2001) (motion to amend brought less than two months before trial date would cause prejudice because additional discovery would be necessary).

“[P]arties seeking to amend a pleading must move with reasonable diligence.” *Willmar Gas Co. v. Duininck*, 58 N.W.2d 197, 199 (Minn. 1953) (affirming trial court’s denial of motion to amend made during trial). *W.V. Nelson Const. Co. v. City of Lindstrom*, 1998 WL 566801, \*2 (Minn. Ct. App. Sept. 8, 1998) (district court’s denial of

motion to amend justified because opposing party would be prejudiced by having to defend against claims that could have been asserted from the outset). Contestee has been aware of the underlying issue for months now and certainly could have raised it long ago; he could also have included it within his motion for leave to amend. He did neither. In these circumstances, justice requires that these claims be stricken.

### CONCLUSION

Contestee has attempted to assert new claims beyond those he sought and was given permission to modify. The Court should strike these unauthorized new claims.

Dated: February 25, 2009

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