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STATE OF MINNESOTA
COUNTY OF RAMSEY

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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' MEMORANDUM IN
OPPOSITION TO MOTION FOR
INVOLUNTARY DISMISSAL**

I. INTRODUCTION

Contestee would have it that Contestants have proven nothing in this contest and that the results certified by the Canvassing Board are indisputably correct. Not so on either count. Indeed, Contestants have presented compelling evidence that thousands of Minnesota absentee ballot voters have been disenfranchised and, as a matter of equity, constitutional law and Minnesota's election laws, should have their votes counted.

From the outset, Contestants have sought to enfranchise voters. Although the Court's rulings and Contestee's constant procedural objections have constrained that effort, Contestants nonetheless have presented evidence over the course of their case, through extensive testimony and documentation, that approximately 1725 rejected absentee ballots are legally cast votes which should be opened and counted. That proof has come in the form of testimony from individual voters, testimony from county and

municipal officials, documents from those officials, and documents and data from the Secretary of State's Office. Based on the preponderance of the evidence the Court should enfranchise these voters.

Contestants have also presented overwhelming evidence of disparate treatment throughout the state of similarly situated absentee ballots. Election official after election official testified to different applications of the statutory standard for determining whether an absentee ballot should be accepted or rejected. Many confirmed that they operated under a substantial compliance regime. Others admitted they simply disregarded requirements this Court now insists must be met for any more ballots to be counted. The preponderance of the evidence reflects not merely minor errors or isolated inconsistencies, but the wholesale disregard of some requirements and the bending of others, such that a voter's ability to have his absentee ballot counted depended on where in the state he lived and cast his ballot. Contestants continue to believe this Court must remedy the situation and ensure equal protection of the law to all absentee ballot voters before it can certify which party received the highest number of legally cast ballots.

In addition, the Court's February 13 Order declaring certain categories of ballots "illegal" under Minnesota law created a set of rules for counting absentee ballots from the November 4, 2008 election that was markedly different from the rules for counting ballots followed by numerous counties on election day and the Canvassing Board on January 3, 2009, as testimony before this Court demonstrates. Thus, adherence to the February 13th Order renders it impossible for this Court to determine the number of

“legally cast votes” for each candidate since the current election day and Canvassing Board totals include votes this Court has ruled “illegal.”

With respect to their remaining claims, Contestants have narrowed them considerably. The evidence has been focused on the double-counting of ballots in ten Minneapolis precincts and the import of the missing ballots from another Minneapolis precinct. The preponderance of the evidence shows that in those precincts where duplicates were made but not marked, and the number of votes tallied in the recount exceeds the number of voters, double-counting occurred and must be remedied. The evidence also establishes some unknown number of unreviewed ballots from precinct 3-1 existed and are indeed missing. That said, the law dictates that they cannot be included as legally cast votes.

In sum, the preponderance of the evidence establishes that the results certified by the Canvassing Board are incorrect. Wrongly rejected absentee ballots must be opened and counted, and Minnesota voters enfranchised. Already accepted absentee ballots that do not meet the Court’s standard must not be counted. Double-counting must be rectified. And missing ballots may not be included in determining which party received the highest number of legally cast votes. When these changes are implemented, Contestant Norm Coleman will be adjudged to have received the highest number of legally cast votes.

II. ARGUMENT

A. Rejected Absentee Ballots

As the Court knows, Contestants believe Minnesota election law recognizes a substantial compliance standard for determining whether an absentee ballot is a legally cast vote and that, in any event, election officials throughout the state applied a de facto substantial compliance standard in the November 4, 2008 election in determining whether to accept or reject an absentee ballot. We believe that as a matter of statutory law, as well as constitutional mandate, a substantial majority of the approximately 11,000 uncounted rejected absentee ballots should be opened and counted. The Court has ruled that it will apply a different standard of strict statutory compliance (with only a very narrow exception for walk-up voters who failed to sign their envelopes and were not reminded by the counter official to do so).¹

Even under the Court's standard, Contestants believe they have presented sufficient evidence that approximately 1725 rejected absentee ballots should be opened and counted.² Contestee's motion and supporting spreadsheets, which contend that a mere handful of ballots will be counted, are simply wrong. Contestee has not accurately cast the evidence. Contestants are preparing a spreadsheet to detail for the Court, voter by voter, the evidence establishing that their votes were legally cast and should be

¹ Coming as late as it does in the process, this clarification of the Court's February 13, 2009 Order has prejudiced Contestants, who have not had the opportunity to include such ballots in their evidence. Contestee, because it is still in the midst of its case, has been able to do so.

² This includes the more than 600 additional rejected absentee ballots, including those for unregistered witnesses with Minnesota addresses and for purported signature mismatches, that even under a strict standard should be considered legally cast votes. This is particularly so given the testimony that most counties did not check registration if the witness had a Minnesota address, as well as that of individual voters in recent days about the various forms of their signatures, all of which are genuine.

counted. For each such voter, Contestants have provided sufficient documents and/or testimony to establish that their ballot meets the requirements of Minn. Stat. § 203B.12 as interpreted by the Court. As the spreadsheet will reflect, Contestants have provided absentee ballot envelopes and applications, together with certifications from local election officials that each did not otherwise vote in the election in his or her precinct or, in some instances, county.³

Contestants have also provided specific registration information for many of these voters and their witnesses, though not all. As the evidence has developed, however, the efficacy—and necessity—of doing so has been called into question. The evidence has demonstrated that the Secretary of State Office's SVRS is not sufficiently up to date to establish registration status or voting history in the November 4, 2008 election. Nor is it sufficiently accurate to be reliable as to other data including that which purports to have been updated. *See* Testimony of Mr. Poser 3/3/09. Until the counties and municipalities have finished in-putting information related to the November 4, 2008 election, the preponderance of the evidence has not established—one way or the other—any question of registration, certainly as to newly registering voters and witnesses. As a result, the absence of specific documentary evidence related to voter registration and witness registration should not be dispositive.

Indeed, until the database is properly updated and verified, there can be no sufficient evidence. Whether offered by Contestants or Contestee, forms regarding

³ With respect to the voters whose secrecy envelopes did contain their voter registration application, the Court should allow both parties to obtain and put into evidence the ballot envelopes and applications necessary to enfranchise them.

individual voters cannot be assured of accuracy. If and when the Secretary of State's Office certifies that the database is sufficiently complete—and accurate—with respect to the November 4, 2008 election, it will provide a CD of all data to the parties and to the Court. It is that data which should be the best evidence—the only acceptable evidence—as to registration for voters and witnesses (and, to the extent the Court deems it necessary to know, whether a voter has already voted in that election elsewhere in the state) and even then it may require the Court to accept as registered any voter whose name is in the system as active regardless of the date the information was entered.

In these circumstances, it would make sense to follow the process dictated by the Supreme Court and the Secretary of State's Office with respect to the 933 ballots opened on January 3, 2009. Those ballots were opened only after election officials had confirmed that the voters were indeed registered and had not already voted in the election. Given that the goal of Minnesota election law is to enfranchise voters, such a procedure makes sense here.

In sum, the preponderance of the evidence supports opening and counting as many as 1725 rejected absentee ballots and, potentially, hundreds more. The Court accordingly should deny the motion for involuntary dismissal as to this claim.

B. Missing Ballots (Minneapolis 3-1)

Contestants have stipulated that the evidence shows that some unknown number of unreviewed ballots are missing. That is where our agreement with Contestee ends. We believe these ballots cannot be counted as a matter of law.

The claim was briefed on Contestee's motion for summary judgment and Contestants will not repeat those arguments in full here. Suffice it to say that these unreviewed ballots—whatever number of them there were—should not be counted—because they cannot be counted. *See, e.g., Newton v. Newell*, 6 N.W. 346 (Minn. 1880) (where ballots have not been carefully preserved so as to place their identity beyond a reasonable doubt, they can not be relied upon in a subsequent recount); *Purcell v. Sparks*, Mower County District Court File No. C5-02-1938 (Jan. 6. 2003). In cases where all of the ballots from a precinct are missing, the courts have defaulted to election night numbers as *prima facie* evidence of numbers. However, where only *some* ballots are alleged to be missing, there should be no “default” to election night numbers, because the ballots themselves are the best evidence—indeed, in this case the sole evidence—of the voter's intent and they are gone. This means Contestants did not have the opportunity to challenge any of these ballots in the recount.

The decision in *Moon v. Harris*, 142 N.W. 12 (Minn. 1913), is not to the contrary. In that case, the Supreme Court affirmed a trial court's decision not to overturn the canvassed result based on an argument that the ballots had been tampered with after the canvas. Similarly, in *Schultz v. Shelp*, 155 N.W. 97 (Minn. 1915), the issue was merely chain of custody—the ballots at issue were produced and counted during the recount. Neither decision stand for the proposition that if ballots are lost the election day result must stand.

The Court accordingly should deny the motion for involuntary dismissal as to this claim.

C. Double-Counting In Certain Minneapolis Precincts

This claim is the subject of a pending motion which has been fully briefed and will be argued at the same time as this motion. Contestants will not repeat their arguments here. It is enough to point out that the testimony of experienced election officials demonstrates that in situations where election judges inadvertently failed to mark duplicates, causing the number of original ballots to exceed the number of duplicate ballots, Rule 9 led to double-counting.

The Rule may have made sense when voter intent was at issue and all involved believed Minnesota law was followed so that the duplicates were properly marked. But as soon as it became evident that not all election judges followed the law in marking duplicates, Rule 9 made no sense. In a recount of the ballots cast on election night, recount officials should have counted the duplicate ballots, and not the originals. Minn. Stat. § 206.86, subd. 5 dictates that only duplicate ballots are run through the machine on election night. Neither the Secretary of State's Office nor the parties can abrogate this clear statutory requirement by agreeing to handle the recount another way.

Contrary to what Contestee says, the record contains the election day pre-registered voter sign-in rosters, same-day registration rosters and absentee ballot and UOCAVA rosters, as well as machine tapes from election night, for ten Minneapolis precincts. *See* Exhibits C55-57 and C 59-62; C85-87 and C89-92; C93-95, C97-98 and C100; C101-103 and C105-06 and C108; C109-111 and C113-115; C116-18 and C120-22; C137-39, C140-42 and C144; C145-47 and C149-51; C152-54 and C156-58; C159-61 and C163-65. The record also reflects the number of ballots actually counted during

the recount. *See* Exhibit C603. In addition, Ms. Howell testified that in her precinct duplicates were made but mistakenly not marked.

By simple math, the number of votes counted during the recount exceeded the number of persons actually casting ballots at those precincts on election night, often by precisely the number of challenged original ballots counted. The preponderance of the evidence, then, demonstrates that double-counting occurred. Any other explanation is but unsubstantiated speculation. Simply put, Contestants have proven this claim as to those ten Minneapolis precincts. The Court accordingly should deny the motion for involuntary dismissal as to this claim as well.

D. Ballots Among The 933 Opened On January 3, 2009 That Do Not Meet The Court's Standard For A Legally Cast Vote

The Court has already ruled on this issue and excluded evidence relating to such ballots. Contestants have submitted a written offer of proof.

E. Absentee Ballots Accepted on Election Day That Do Not Meet the Court's Standard For a Legally Cast Vote

This claim is the subject of a pending motion. Although the Court has excluded evidence related to such ballots and Contestants have submitted a written offer of proof, the Court has yet to rule. Contestants accordingly rely on their brief and supplemental letters to the Court and will not repeat their position here, except to note that the waiver analysis in *Bell v. Gannaway*, 227 N.W.2d 797 (Minn. 1975), cannot be applied in the present circumstances because Contestants never had the ability to challenge the determination by local boards or election judges whether to accept or reject any absentee ballot.

We also note that the determination of which party received the highest number of legally cast votes is for the Court to determine—not for the U.S. Senate—and that to do so the Court cannot create two classes of ballots as it has done by rendering its February 13, 2009 Order finding certain ballots to be “illegal” but apparently including similar ballots in the counts election day and in the recount. The remedy is one set of rules for counting all absentee ballots from the November 4, 2009 election—rather than creating due process infirmities by changing the rules in the midst of the process. The only other alternative is for the Court to declare that on the record presented it is unable to determine which party received the highest number of legally cast votes in the U.S. Senate election.

F. Equal Protection

To the extent equal protection is still an open issue, it is decidedly one for this Court—and not the U.S. Senate. Contestants pleaded and have argued from the outset that all similarly situated absentee ballots must be treated the same and that in deciding which votes are legally cast the Court must ensure that the applicable standard is consistently and evenly applied. That is, if envelopes reflecting one or another deficiency under a strict compliance standard were regularly accepted on election day by one or many other jurisdictions under a de facto substantial compliance standard, similar envelopes should be accepted by this Court as legally cast votes. One compelling example is witness registration; many counties, and the majority of populous ones, testified that they simply do not check so long as the witness provides a Minnesota address; others, like Carver County, rejected an astonishing 181 absentee ballots for this

purported deficiency. Absentee ballots are not any less subject to constitutional protections than are those cast at the polls; they may be treated differently than those cast at the polls but as among themselves they must be treated equally.

The evidence at trial was overwhelming that regardless of how clear the statutory standard may be, it was applied inconsistently—regularly and not just in isolated incidents--by various counties and municipalities throughout the state. The Court has excluded further testimony on these inconsistencies. Contestants accordingly have made a written offer of proof.

G. Other Claims

Throughout the trial, Contestants have sought to narrow their claims so as not to overly burden the process and to focus on the important defects in the numbers certified by the Canvassing Board. As a result, Contestants are not pursuing and have not submitted evidence related to the claims Contestee addresses at subsections 1, 4, and 7-12 of Section C in its Memorandum.

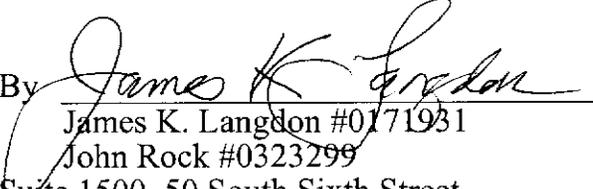
III. CONCLUSION

For the reasons set forth above, Contestee's motion should be denied, leaving him to present the remainder of his evidence and Contestants their rebuttal case. Only then should the Court rule as to whether the record allows it to determine how many votes were legally cast and, if so, which party received the highest number of them.

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