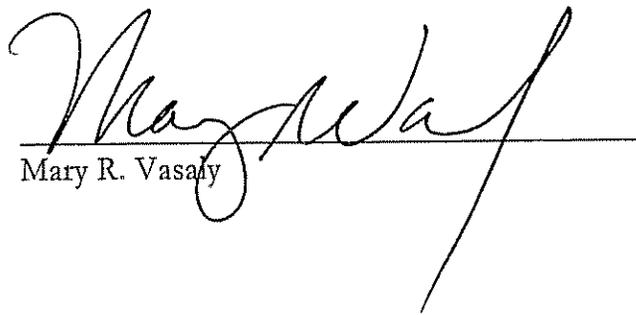


3. Attached hereto as Exhibit B are copies of the six original ballots from Minneapolis Ward 9, Precinct 2, that are referred to in Paragraph 10 of the Petition and the Affidavit of Amy S. Walstien, Ex. 1. They are not identified as "original" ballots.

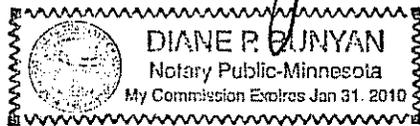
4. Attached hereto as Exhibit C is a true and correct copy of the Memorandum of the Al Franken for Senate Committee and Al Franken Regarding Canvassing Board Proceedings.

Further your Affiant sayeth not.


Mary R. Vasaty

Subscribed and sworn to before me
this 22nd day of December, 2008.


Notary Public



Citation/Title

2007 WL 1191781, Estate of O'Neil, In re, (Minn.App. 2007)

1191781 Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

In re the ESTATE OF John G. O'NEIL, Decedent.

No. A06-1224.
April 24, 2007.

Isanti County District Court, File No. 30-P5-04-1488.

David K. Snyder, Joshua D. Christensen, Eckbert, Lammers, Briggs, Wolff & Tierling, P.L.L.P., Stillwater, MN, for appellant Doris O'Neil.

Travis D. Stottler, Jonathan R. Cuskey, Miller Law Office, P.A., Wyoming, MN, for respondents Donald Larson and Michael O'Neil.

Considered and decided by DIETZEN, Presiding Judge; RANDALL, Judge; and HUDSON, Judge.

UNPUBLISHED OPINION

DIETZEN, Judge.

**1 Appellant challenges the district court's judgment, which denied her objection to the inventory and final account of the estate, arguing that the district court erred in allowing payment of the expenses of administration from the homestead and awarding respondents attorney fees. Because homestead assets are statutorily exempt, we reverse.

FACTS

Decedent, John G. O'Neil, died with a will in November 2004. Appellant, Doris O'Neil, is the natural guardian of Amy O'Neil, who is decedent's only child. Because the marriage had been dissolved, decedent had no surviving spouse. Amy O'Neil was not mentioned in decedent's will, but by operation of the laws of intestacy, she is the sole heir of decedent and the sole beneficiary of the estate. The will designates decedent's sister, Mary Ann Hunstad, as the personal representative of the estate; and the decedent's brother, Michael O'Neil, is the designated alternative. (FN1)

In November 2004, appellant, who was unaware that decedent had a will, filed a petition to adjudicate the intestacy of decedent and appoint herself as the personal representative of the estate. In December 2004, respondent Michael

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EXHIBIT A

2007 WL 1191781, Estate of O'Neil, In re, (Minn.App. 2007)

O'Neil filed a petition objecting to appellant's appointment as personal representative and filed a petition to probate decedent's will. In February 2005, the district court appointed respondents Donald Larson and Michael O'Neil as co-personal representatives of the estate. In June 2005, the representatives sold decedent's home and later submitted an inventory of the estate.

Appellant objected to the inventory and final account of the estate, asserting, inter alia, that respondents lacked authority to pay expenses of the estate from the proceeds of the homestead sale, that the inventory improperly included decedent's pickup truck and other personal property, that the personal representative was not entitled to compensation, and that the attorney fees were excessive. Following a hearing, the district court issued findings of fact, conclusions of law, and an order for judgment denying appellant's objection to inventory and final account. The district court held that the personal representatives acted in accordance with "[d]ecedent's intentions as expressed in his last will and testament" and the statute by "selling the real property of the estate for the benefit of interested persons" and ordered the estate to pay the attorney fees and other administrative expenses. This appeal follows.

DECISION

I.

Appellant argues that the district court erred in allowing the payment of administrative expenses from assets that are statutorily exempt under the homestead exemption of Minn.Stat. § 524.2-402 (2006).

Statutory interpretation is a question of law, which this court reviews de novo. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn.1998). The goal of statutory interpretation is to effectuate the legislative intent. Minn.Stat. § 645.16 (2006). The district court's findings of fact are given great deference and shall not be set aside unless clearly erroneous. Minn. R. Civ. P. 52.01; *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn.1999).

**2 Minn.Stat. § 524.2-402(c) provides:

If the homestead passes by descent or will to the spouse or decedent's descendants, it is exempt from all debts which were not valid charges on it at the time of decedent's death except that the homestead is subject to a claim filed pursuant to section 246.53 for state hospital care or 256B.15 for medical assistance benefits.

The statute is consistent with Minnesota common law, which states that a decedent's homestead is not considered part of the estate for purposes of administration. *In re Estate of Van Den Boom*, 590 N.W.2d 350, 353 (Minn.App.1999), review denied (Minn. May 26, 1999); see also *Bengtson v. Setterberg*, 227 Minn. 337, 359, 35 N.W.2d 623, 634 (1949) (stating that the homestead is not part of the estate for the purposes of administration); *Dills*

2007 WL 1191781, Estate of O'Neil, In re, (Minn.App. 2007)

r. Axberg (In re Anderson's Estate), 202 Minn. 513, 517, 279 N.W. 266, 268 (1938) (homestead passes free of debts); *Christianson v. Olson*, 191 Minn. 166, 169, 253 N.W. 661, 662 (1934) (stating that homestead never, for an instant, becomes part of estate for purposes of administration). Courts are to liberally construe homestead laws. *In re Estate of Riggle*, 654 N.W.2d 710, 714 (Minn.App.2002).

A. Application of the Statute

Respondents argue that the homestead exemption does not apply because the homestead was not specifically devised to Amy O'Neil. But the statute exempts homesteads from most categories of debt, whether received "by descent or will." Thus, the statute does not differentiate between a homestead that passes by a specific devise and one that passes as a part of the residuary estate.

Here, Amy O'Neil is entitled to take by the operation of the laws of intestacy. Thus, the homestead should have passed to her "exempt from all debts which were not valid charges on it at the time of decedent's death[.]" Minn.Stat. § 524.2-402(c). The administrative expenses at issue were expenses that were incurred as a result of decedent's death. Such administrative expenses are not chargeable against the homestead, absent written agreement of the interested parties. *Van Den Boom*, 590 N.W.2d at 353 n. 2. In *Van Den Boom*, the court held that a surviving spouse could sell her interest in the homestead, but could not defeat the homestead exemption rights of the remaindermen by directing the personal representative to sell the homestead. *Id.* at 354. We conclude that *Van Den Boom* also precludes a personal representative from encumbering a child's right to the homestead by charging administrative expenses against the homestead.

B. Intent of the Will

Respondents argue that the will specifically authorizes payment of administrative expenses from the proceeds from the sale of the homestead. The will provides:

My personal representative shall pay from the residue of my estate the expenses of my last illness and funeral, valid debts including any taxes owed by me at my death, expenses of administering my estate, including non-probate assets, and any estate and other death taxes, except any generation skipping transfer tax, which become due because of my death, including any interest and penalties. There shall be no apportionment of any such taxes, and I waive on behalf of my estate any right to recover any part of them from any person, including any recipient of property passing apart from this will.

**3 The will also gives the personal representative "the power, exercisable without authorization of any court ... to sell at private or public sale ... any or all of the real or personal property of my estate."

The intention of a testator is to be followed, if it is not inconsistent with

2007 WL 1191781, Estate of O'Neil, In re, (Minn.App. 2007)

the rules of law. *In re Tuthill's Will*, 247 Minn. 122, 126, 76 N.W.2d 499, 502 (1956) (quoting *In re Trusteeship of Ordean*, 195 Minn. 120, 125, 261 N.W. 706, 708 (1935)). This intent is to be gathered from within the four corners of the will, read in light of the surrounding circumstances. *Id.*

But general provisions of a will authorizing the payment of debts are not sufficient to authorize payment from homestead proceeds. *Overvold v. Nelson (In re Estate of Overvold)*, 186 Minn. 359, 366, 243 N.W. 439, 442 (1932) (holding that debts are not chargeable against homestead if will includes general provision for the payment of debts); *Larson v. Curran (In re Norseth's Estate)*, 121 Minn. 104, 140 N.W. 337 (1913); see *In re Estate of Chase*, 182 Minn. 271, 275, 234 N.W. 294, 295 (1931) (permitting charges against homestead if will included direction to pay debts and express provision that the homestead be sold for the purpose of carrying out the provisions of the will). In *Larson*, the decedent's will stated, "It is my will and I hereby direct that all my just debts shall be paid out of my estate as soon as the same can be determined after my decease." 121 Minn. at 106, 140 N.W. at 337. The court found that the direction in the will to pay his debts did not indicate intent to charge the exempt homestead property with payment of such debts. *Id.* at 110, 140 N.W. at 339.

Here, decedent's will repeats "purely formal phrase[s]," which are not sufficient to show an intent to forfeit the homestead protections. *Larson*, 121 Minn. at 110, 140 N.W. at 339. Thus, the will does not specifically contemplate sale of the homestead to pay administrative or other expenses. See also *Riggle*, 654 N.W.2d at 714 (prohibiting decedent from forfeiting spouse's or child's interest when law governing homestead protections are not met).

C. Authorization of Homestead Sale

Respondents further argue that the statutory authority to sell the homestead contemplates the authority to use the proceeds to pay expenses of the estate. Respondents rely heavily on the 2006 amendment to Minn.Stat. § 524.3-715, subd. 23 (2004), which authorizes the personal representative to:

sell, mortgage, or lease any real or personal property of the estate or any interest therein, including the homestead, exempt or otherwise, for cash, credit, or for part cash and part credit, with or without security for unpaid balances, and without the consent of any devisee or heir unless the property has been specifically devised to a devisee or heir by decedent's will, except that the homestead of a decedent when the spouse takes any interest therein shall not be sold, mortgaged or leased unless the written consent of the spouse has been obtained.

**4 (Emphasis added). (FN2)

Appellant concedes that the sale of the homestead was authorized by Minn.Stat. § 524.3-715, but argues that statute does not authorize or address the use of proceeds from the homestead to cover expenses of administration. Respondents

2007 WL 1191781, Estate of O'Neil, In re, (Minn.App. 2007)

argue that the statute's authority to sell the homestead necessarily includes the right to use the proceeds to pay the administrative expenses.

The legislature clearly intended if there is a surviving child of the decedent, the proceeds of a sale of a homestead would be exempt from the reach of creditors. Minn.Stat. § 524.2-402(c). When interpreting statutes, we seek to harmonize potentially conflicting provisions and give effect to all provisions. See Minn.Stat. 645.16, 645.17(2) (2006) (directing courts to give effect to all statutory provisions, where possible).

We see no conflict between Minn.Stat. 524.3-715, which gives the personal representative the right to sell the homestead, and Minn.Stat. 524.2-402, which exempts the homestead from the estate for purposes of administration. Accord Minn.Stat. § 510.07 (2006) (providing that the proceeds from sale of a homestead are exempt from creditors for one year). (FN3) Minn.Stat. § 524.3-715 authorizes the personal representative to sell the property; it does not authorize conversion of an exempt asset to a nonexempt asset or authorize the use of the proceeds from an exempt asset to pay administrative costs.

This result is further supported by our state's expressed policy of protecting the interests and expectations of surviving spouses and children. See *Riggle*, 554 N.W.2d at 714 (noting that courts are to liberally construe homestead laws). If a personal representative was permitted to unilaterally sell exempt property and then treat the proceeds of the sale as non-exempt, the protections of the homestead exemption would be wholly eviscerated. Thus, in order to give effect to the homestead provision, we interpret Minn.Stat. 524.3-715 to authorize only the sale of a homestead and do not read into it any authority to convert the proceeds of the sale to a non-exempt asset.

Respondents further argue that Amy O'Neil failed to timely object and, therefore, impliedly authorized the sale and use of the proceeds to pay the costs of administration. A waiver of an existing property or legal right is not favored and must be clearly shown. *Overvold*, 186 Minn. at 367, 243 N.W. at 442. On this record, we see no evidence of waiver.

II.

Appellant argues that certain personal property of the estate is exempt under Minn.Stat. § 524.2-403 (2006). The estate included personal property valued in the final inventory at \$11,000.

By statute, if there is no surviving spouse and the decedent's children were not intentionally omitted from the will, such children are entitled to "(1) property not exceeding \$10,000 in value in excess of any security interests therein, in household furniture, furnishings, appliances, and personal effects ...; and (2) one automobile, if any, without regard to value." Minn.Stat. § 524.2-403(a), (b). For adult children, the statute permits certain claims against these assets, including administrative expenses, funeral expenses, and taxes. Minn.Stat. §§ 524.2-403(f), 524.3-805 (2006).

2007 WL 1191781, Estate of O'Neil, In re, (Minn.App. 2007)

**5. Because Amy O'Neil was a minor, the personal property is exempt from administrative expenses. The personal property listed in the final account totaled \$11,000, including a truck. The truck itself is an exempt asset, without regard to its value. Minn.Stat. § 524.2-403(a)(2), (b). After reducing the total value of personal property by the value of the truck (estimated by appellant to be \$6,000), the remaining value of the personal property is below the \$10,000 threshold. Minn.Stat. § 524.2-403(a)(1). Thus, the personal property is not available to satisfy administrative expenses, including attorney fees.

III.

Appellant argues that the district court erred in awarding attorney fees, and that the fees incurred by respondents and paid out of the sale of the homestead were not reasonable or necessary. A district court's determination of attorney fees and costs in a probate matter is reviewed for abuse of discretion. *In re Estate of Martignacco*, 689 N.W.2d 262, 271 (Minn.App.2004), review denied (Minn. Jan. 26, 2005). The reasonable value of attorney fees is a question of fact, which must be upheld by a reviewing court unless clearly erroneous. *Amerman v. Lakeland Dev. Corp.*, 295 Minn. 536, 537, 203 N.W.2d 400, 400-01 (1973). Because we reverse the district court's order allowing administrative expenses to be paid from the proceeds of the homestead, and respondents concede that all other assets of the estate are also exempt, the amount and reasonableness of the fee award is moot.

Reversed.

(FN1.) Mary Ann Hunstad declined the appointment as personal representative.

(FN2.) Both before and after amendment, the statute permitted the sale of "any real ... property." With amendment, "any real ... property" has been clarified to include the homestead. See 2006 Minn. Laws ch. 221 (describing the amendments as "clarifying the administrative powers of personal representatives to sell, mortgage, or lease property of a decedent"). Therefore, the amendment does not give the personal representatives any more authority than they had under the previous version of the statute and applying it to the case at hand does not constitute prohibited retroactive application. See *Nardini v. Nardini*, 414 N.W.2d 184, 196 (Minn.1987) (stating "a clarifying act is to be read into statutory law retrospectively"); 2006 Minn. Laws ch. 221, § 24 (stating that the 2006 amendment applies "to every conveyance by a personal representative made before, on or after the effective date of this section" with limited exceptions).

(FN3.) This general statute is not part of the probate code and is instead codified in the statutory chapter addressing property interests and liens. But when the probate statutes are lacking, "Minnesota courts have looked to the legal principles in the debtor-creditor area for guidance." *Riggle*, 654 N.W.2d at 714.

OFFICIAL BALLOT

HENNEPIN COUNTY

Judge

Judge

STATE OF MINNESOTA

NOVEMBER 4, 2008

STATE GENERAL ELECTION BALLOT

INSTRUCTIONS TO VOTERS
To vote, completely fill in the oval(s) next to your choice(s) like this: ●

FEDERAL OFFICES

PRESIDENT AND VICE-PRESIDENT
VOTE FOR ONE TEAM

JOHN MCCAIN AND SARAH PALIN
Republican

BARACK OBAMA AND JOE BIDEN
Democratic-Farmer-Labor

CYNTHIA MCKINNEY AND ROSA CLEMENTE
Green

ROGER CALERO AND ALYSON KENNEDY
Socialist Workers

RALPH NADER AND MATT GONZALEZ
Independent

BOB BARR AND WAYNE A. ROOT
Libertarian

CHUCK BALDWIN AND DARRELL CASTLE
Constitution

write in, if any

U.S. SENATOR
VOTE FOR ONE

DEAN BARKLEY
Republican

NORM COLEMAN
Democrat

AL FRANKEN
Democratic-Farmer-Labor

CHARLES ALDRICH
Libertarian

JAMES NIEMACKL
Republican

write in, if any

U.S. REPRESENTATIVE
DISTRICT 5
VOTE FOR ONE

BILL MCGAUGHEY
Republican

BARD DAVID WHITE
Democrat

KEITH ELLISON
Democratic-Farmer-Labor

write in, if any

2008 US REP. DIST 5

VOTE FRONT AND BACK OF BALLOT

11-011 Gen 0453 Rev 01

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EXHIBIT B

STATE GENERAL ELECTION BALLOT

HENNEPIN COUNTY STATE OF MINNESOTA NOVEMBER 4, 2008

INSTRUCTIONS TO VOTERS
To vote, completely fill in the oval(s) next to your choice(s) like this: ●

U.S. Senator 9-2
Precinct:
Challenged ballot #: 1
Challenged by COLEMAN
Challenge reason: No Dup



Typ 01 8ac0453 3of01

VOTE FRONT AND BACK OF BALLOT

OFFICIAL BALLOT

Judge Judge

HENNEPIN COUNTY STATE OF MINNESOTA NOVEMBER 4, 2008

STATE GENERAL ELECTION BALLOT

INSTRUCTIONS TO VOTERS To vote, completely fill in the oval(s) next to your choice(s) like this: ●

FEDERAL OFFICES

PRESIDENT AND VICE-PRESIDENT VOTE FOR ONE TEAM

JOHN MCCAIN AND SARAH PALIN Republican

BARACK OBAMA AND JOE BIDEN Democratic-Farmer-Labor

CYNTHIA MCKINNEY AND ROSA CLEMENTE Green

ROGER CALERO AND ALYSON KENNEDY Socialist Workers

RALPH HADER AND MATT GONZALEZ Independent

BOB BARR AND WAYNE A. RUDT Libertarian

CHUCK BALDWIN AND DARRELL CASTLE Constitution

write-in, if any

U.S. SENATOR VOTE FOR ONE

DEAN BARKLEY Republican

NORM COLEMAN Republican

AL FRANKEN Democratic-Farmer-Labor

CHARLES ALDRICH Libertarian

JAMES NIEMACKL Constitution

write-in, if any

U.S. REPRESENTATIVE DISTRICT 5 VOTE FOR ONE

BILL MCGAUGHEY Republican

BARB DAVIS WHITE Republican

KEITH ELLISON Democratic-Farmer-Labor

write-in, if any

8894 US REP. DIST 5

Typ 01 Sec 043 Scr 01

VOTE FRONT AND BACK OF BALLOT

889-388-888

STATE GENERAL ELECTION BALLOT

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INSTRUCTIONS TO VOTERS
To vote, completely fill in the oval(s) next to your choice(s) like this: ●

U.S. Senator 9-2
Precinct:
Challenged ballot #: 2
Challenged by COLEMAN
Challenge reason: Do Dop

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OFFICIAL BALLOT

Judge

Judge

HENNEPIN COUNTY

STATE OF MINNESOTA

NOVEMBER 4, 2008

STATE GENERAL ELECTION BALLOT

INSTRUCTIONS TO VOTERS
To vote, completely fill in the oval(s) next to your choice(s) like this: ●

FEDERAL OFFICES

PRESIDENT AND VICE-PRESIDENT VOTE FOR ONE TEAM

- JOHN MCCAIN AND SARAH PALIN Republican
BARACK OBAMA AND JOE BIDEN Democratic-Farmer-Labor
CYNTHIA MCKINNEY AND ROSA CLEMENTE Green
ROGER CALERO AND ALYSON KENNEDY Socialist Workers
RALPH NADER AND MATT GONZALEZ Independents
BOB BARR AND WAYNE A. RIDD Liberal
CHUCK BALDWIN AND DARRELL CASTLE Constitution

U.S. SENATOR VOTE FOR ONE

- DEAN BARKLEY Independence
NORM COLEMAN Republican
AL FRANKEN Democratic-Farmer-Labor
CHARLES ALDRICH Liberal
JAMES HENACKL Constitution

U.S. REPRESENTATIVE DISTRICT 5 VOTE FOR ONE

- BILL MCGAUGHEY Independence
BARB DAVIS WHITE Republican
KEITH ELLISON Democratic-Farmer-Labor

1914 US REP - DIST 5

Typ 01, Sec 0433, Rev 01

VOTE FRONT AND BACK OF BALLOT

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STATE GENERAL ELECTION BALLOT

INSTRUCTIONS TO VOTERS To vote, completely fill in the oval(s) next to your choice(s) like this: ●

Form containing various election categories: FEDERAL OFFICES (President and Vice-President, U.S. Senator, U.S. Representative, State Representative), COUNTY OFFICES (Soil and Water Conservation District Supervisors), SCHOOL DISTRICT QUESTIONS (Special Election, School District Ballot Questions 1 and 2), and CONSTITUTIONAL AMENDMENT (Clean Water, Wildlife, Cultural Heritage and Natural Areas).

1755 CITY OF MINNEAPOLIS W 9 P 2

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STATE GENERAL ELECTION BALLOT

B HENNEPIN COUNTY	E STATE OF MINNESOTA	F NOVEMBER 4, 2008
INSTRUCTIONS TO VOTERS To vote, completely fill in the oval(s) next to your choice(s) like this: <input type="radio"/>		
JUDICIAL OFFICES	4TH DISTRICT COURT	4TH DISTRICT COURT
SUPREME COURT	JUDGE 14 VOTE FOR ONE	JUDGE 56 VOTE FOR ONE
ASSOCIATE JUSTICE 3 VOTE FOR ONE	<input type="radio"/> GEORGE F. MCGUNNIGLE <small>Incumbent</small>	<input type="radio"/> HERBERT P. LEFLER <small>Incumbent</small>
<input type="radio"/> PAUL H. ANDERSON <small>Incumbent</small>	<small>write-in, if any</small>	<small>write-in, if any</small>
<input type="radio"/> TIM TINGELSTAD	JUDGE 15 VOTE FOR ONE	JUDGE 57 VOTE FOR ONE
<small>write-in, if any</small>	<input type="radio"/> TONY N. LEUNG <small>Incumbent</small>	<input type="radio"/> JEANNICE M. REDING <small>Incumbent</small>
ASSOCIATE JUSTICE 4 VOTE FOR ONE	<small>write-in, if any</small>	<small>write-in, if any</small>
<input type="radio"/> LORIE SKJERVEN GILDEA <small>Incumbent</small>	JUDGE 19 VOTE FOR ONE	JUDGE 59 VOTE FOR ONE
<input type="radio"/> DEBRAH HEDLUND	<input type="radio"/> GINA M BRANDT <small>Incumbent</small>	<input type="radio"/> WARREN R. SAGSTUEN <small>Incumbent</small>
<small>write-in, if any</small>	<small>write-in, if any</small>	<small>write-in, if any</small>
COURT OF APPEALS	JUDGE 20 VOTE FOR ONE	JUDGE 60 VOTE FOR ONE
JUDGE 16 VOTE FOR ONE	<input type="radio"/> DANIEL C. MORENO <small>Incumbent</small>	<input type="radio"/> LLOYD ZIMMERMAN <small>Incumbent</small>
<input type="radio"/> DAN GRIFFITH	<small>write-in, if any</small>	<small>write-in, if any</small>
<input type="radio"/> TERRI J. STONEBURNER <small>Incumbent</small>	JUDGE 25 VOTE FOR ONE	JUDGE 61 VOTE FOR ONE
<small>write-in, if any</small>	<input type="radio"/> ROBERT A. BLAESER <small>Incumbent</small>	<input type="radio"/> ROBERT M. SMALL <small>Incumbent</small>
JUDGE 1 VOTE FOR ONE	<small>write-in, if any</small>	<small>write-in, if any</small>
<input type="radio"/> EDWARD TOUSSAINT, JR. <small>Incumbent</small>	JUDGE 27 VOTE FOR ONE	JUDGE 62 VOTE FOR ONE
<small>write-in, if any</small>	<input type="radio"/> JAY M. QUAM <small>Incumbent</small>	<input type="radio"/> RONALD L. ABRAMS <small>Incumbent</small>
JUDGE 8 VOTE FOR ONE	<small>write-in, if any</small>	<small>write-in, if any</small>
<input type="radio"/> THOMAS J. KALITOWSKI <small>Incumbent</small>	JUDGE 28 VOTE FOR ONE	
<small>write-in, if any</small>	<input type="radio"/> TODDRICK S. BARNETTE <small>Incumbent</small>	
JUDGE 9 VOTE FOR ONE	<small>write-in, if any</small>	
<input type="radio"/> ROGER M. KLAPHAKE <small>Incumbent</small>	JUDGE 30 VOTE FOR ONE	
<small>write-in, if any</small>	<input type="radio"/> SUSAN M. ROBINER <small>Incumbent</small>	
JUDGE 10 VOTE FOR ONE	<small>write-in, if any</small>	
<input type="radio"/> HARRIET LANSING <small>Incumbent</small>	JUDGE 31 VOTE FOR ONE	
<small>write-in, if any</small>	<input type="radio"/> MARGARET ANNE DALY <small>Incumbent</small>	
JUDGE 15 VOTE FOR ONE	<small>write-in, if any</small>	
<input type="radio"/> KEVIN G. ROSS <small>Incumbent</small>	JUDGE 32 VOTE FOR ONE	
<small>write-in, if any</small>	<input type="radio"/> PETER A. CAHILL <small>Incumbent</small>	
4TH DISTRICT COURT	<small>write-in, if any</small>	
JUDGE 9 VOTE FOR ONE	JUDGE 33 VOTE FOR ONE	
<input type="radio"/> EUGENE LINK	<input type="radio"/> JACK NORDBY <small>Incumbent</small>	
<input type="radio"/> PHILIP D. BUSH <small>Incumbent</small>	<small>write-in, if any</small>	
<small>write-in, if any</small>	JUDGE 35 VOTE FOR ONE	
JUDGE 63 VOTE FOR ONE	<input type="radio"/> JOHN L. HOLAHAN <small>Incumbent</small>	
<input type="radio"/> DAVID L. PIPER	<small>write-in, if any</small>	
<input type="radio"/> JANE RANUM	JUDGE 37 VOTE FOR ONE	
<small>write-in, if any</small>	<input type="radio"/> RICHARD S. SCHERER <small>Incumbent</small>	
JUDGE 68 VOTE FOR ONE	<small>write-in, if any</small>	
<input type="radio"/> THOMAS F. HAEG	JUDGE 38 VOTE FOR ONE	
<input type="radio"/> JAMES T. SWENSON <small>Incumbent</small>	<input type="radio"/> BERYL A. NORD <small>Incumbent</small>	
<small>write-in, if any</small>	<small>write-in, if any</small>	
JUDGE 1 VOTE FOR ONE	JUDGE 42 VOTE FOR ONE	
<input type="radio"/> BILL KOCH <small>Incumbent</small>	<input type="radio"/> CHARLES A. PORTER, JR <small>Incumbent</small>	
<small>write-in, if any</small>	<small>write-in, if any</small>	
JUDGE 4 VOTE FOR ONE	JUDGE 43 VOTE FOR ONE	
<input type="radio"/> ANN LESLIE ALTON <small>Incumbent</small>	<input type="radio"/> JANET NORDELL POSTON <small>Incumbent</small>	
<small>write-in, if any</small>	<small>write-in, if any</small>	
JUDGE 6 VOTE FOR ONE	JUDGE 46 VOTE FOR ONE	
<input type="radio"/> KERRY MEYER <small>Incumbent</small>	<input type="radio"/> STEPHEN C. ALDRICH <small>Incumbent</small>	
<small>write-in, if any</small>	<small>write-in, if any</small>	
JUDGE 10 VOTE FOR ONE	JUDGE 47 VOTE FOR ONE	
<input type="radio"/> KATHRYN L. QUAINANCE <small>Incumbent</small>	<input type="radio"/> TANYA M. BRANSFORD <small>Incumbent</small>	
<small>write-in, if any</small>	<small>write-in, if any</small>	
JUDGE 11 VOTE FOR ONE	JUDGE 51 VOTE FOR ONE	
<input type="radio"/> MARY STEENSON DUFRESNE <small>Incumbent</small>	<input type="radio"/> IVY S. BERNHARDSON <small>Incumbent</small>	
<small>write-in, if any</small>	<small>write-in, if any</small>	

U.S. Senator 9-2
 Precinct: 7
 Challenged ballot #: ?
 Challenged by: FRANKEN
 Challenge reason: Intent

VOTE FRONT AND BACK OF BALLOT

U.S. Senator 9-2
Precinct: 6
Challenged ballot #: 6
Challenged by FRANKEN
Challenge reason: No Dup

OFFICIAL BALLOT

Judge Judge

HENNEPIN COUNTY

STATE OF MINNESOTA

NOVEMBER 4, 2008

STATE GENERAL ELECTION BALLOT

INSTRUCTIONS TO VOTERS
To vote, completely fill in the oval(s) next to your choice(s) like this:

FEDERAL OFFICES

PRESIDENT AND VICE-PRESIDENT VOTE FOR ONE TEAM

JOHN MCCAIN AND SARAH PALIN Republican

BARACK OBAMA AND JOE BIDEN Democratic-Farmer-Labor

CYNTHIA MCKINNEY AND ROSA CLEMENTE Green

ROGER CALERO AND ALYSON KENNEDY Socialist Workers

RALPH NADER AND MATT GONZALEZ Independent

BDB BARR AND WAYNE A. ROOT Libertarian

CHUCK BALDWIN AND DARRELL CASTLE Constitution

write-in, if any

U.S. SENATOR VOTE FOR ONE

DEAN BARKLEY Republican

NORM COLEMAN Republican

AL FRANKEN Democratic-Farmer-Labor

CHARLES ALDRICH Libertarian

JAMES REMACKL Constitution

write-in, if any

U.S. REPRESENTATIVE DISTRICT 5 VOTE FOR ONE

BILL MCGAUGHEY Republican

DAN DAVIS WHITE Republican

KEITH ELLISON Democratic-Farmer-Labor

write-in, if any

1104 US REP - DIST 5

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VOTE FRONT AND BACK OF BALLOT

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U S Senator
Precinct: 9-2
Challenged ballot #: 5
Challenged by COLEMAN
Challenge reason: No DUP

OFFICIAL BALLOT

Judge Judge

HENNEPIN COUNTY STATE OF MINNESOTA NOVEMBER 4, 2008

STATE GENERAL ELECTION BALLOT

INSTRUCTIONS TO VOTERS To vote, completely fill in the oval(s) next to your choice(s) like this: ●

FEDERAL OFFICES

PRESIDENT AND VICE-PRESIDENT VOTE FOR ONE TEAM

- JOHN MCCAIN AND SARAH PALIN Republican
BARACK OBAMA AND JOE BIDEN Democratic-Farmer Labor
CYNTHIA MCKINNEY AND ROSA CLEMENTE Green
ROGER CALERO AND ALYSON KENNEDY Duckbill Workday
RALPH NADER AND MATT GONZALEZ Independent
BOB BARR AND WAYNE A. ROOT Libertarian
CHUCK BALDWIN AND DARRELL CASTLE Conservative

write-in Party

U.S. SENATOR VOTE FOR ONE

- DEAN BARKLEY Independence
NORM COLEMAN Republican
AL FRANKEN Democratic-Farmer Labor
CHARLES ALDRICH Libertarian
JAMES NIEMACKL Conservative

write-in Party

U.S. REPRESENTATIVE DISTRICT 5 VOTE FOR ONE

- BILL MCGAUGHEY Independence
BARB DAVIS WHITE Republican
KEITH ELLISON Democratic-Farmer Labor

write-in Party

1094 US REP - DIST 5

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VOTE FRONT AND BACK OF BALLOT

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STATE GENERAL ELECTION BALLOT

0	HENNEPIN COUNTY	1	STATE OF MINNESOTA	2	NOVEMBER 4, 2008
INSTRUCTIONS TO VOTERS To vote, completely fill in the oval(s) next to your choice(s) like this: 					
<p>U.S. Senator 9-2 Precinct: Challenged ballot #: 4 Challenged by COLEMAN Challenge reason: No Dup</p>					
  					
3		4		5	TYPE 291 Sec 0450 Oct 01

VOTE FRONT AND BACK OF BALLOT

In Re: 2008 United States Senate Election

**MEMORANDUM OF THE AL FRANKEN FOR
SENATE COMMITTEE AND AL FRANKEN
REGARDING CANVASSING BOARD
PROCEEDINGS**

I. INTRODUCTION

On Tuesday, December 16, 2008, this Board will meet to canvass the results of the recount of the 2008 Minnesota U.S. Senate election. In prior hearings, members of this Board have concluded that the State Canvassing Board does not have sweeping, adjudicative powers in performing its duty to conduct the canvass, but rather is charged simply with recounting the ballots properly cast and determining voter intent with respect to individual ballots. *See* State Canvassing Board Hearing, December 12, 2008; State Canvassing Board Hearing, November 26, 2008. To be consistent with those views, this Board now must limit the types of challenges it considers in its canvass.

In preparation for the canvass, the Al Franken for Senate Committee (the "Franken Committee") has withdrawn thousands of the 3,278 challenges it initially asserted. With this brief, the Franken Committee withdraws additional challenges, leaving only 436 ballot-specific challenges for Board consideration. (The remaining ballot-specific challenges are attached as Exhibit A to this memorandum; Exhibit B identifies all of the challenges withdrawn to date). These ballot-specific challenges include only those *specific* ballots presenting serious questions of determining for whom the voter intended to cast his or her ballot in the 2008 U.S. Senate General Election (or whether a distinguishing mark on the face

of the ballot disqualifies the ballot from being counted in the recount). By the reasoning of this Canvassing Board, these are the only challenges properly before this Board.

In addition to these ballot-specific challenges, the Franken Committee is reserving, pending clarification from this Board, 339 additional challenges relating to incidents occurring in various counting centers around the state. Indeed, both campaigns have asserted mass challenges arising from specific "incidents" occurring in dozens of counting locations around the state, documented in over 90 formal "incident reports" prepared by the counties themselves and over 250 "incident reports" prepared by the Franken Committee alone. These blanket "incident-based" challenges range from the behavior of county recount officials (in one instance forcing a public repudiation of challenges, resulting in an emotional breakdown of a campaign observer), to "chain of custody" concerns arising from unsealed or loosely sealed ballot envelopes or ballots that were secured separately from other secured ballots from the same precinct, to allegations of ballot duplication errors by county election officials. The scope and range of these mass "incident based" challenges is sweeping and includes 339 challenges (identified in Exhibit C) by the Franken Committee alone.¹

In light of the position this Board has taken in its prior hearings, the Franken Committee understands that none of these intensely fact-bound and hotly-disputed "incident-based" challenges are properly the subject of a challenge before this Board. *See, e.g.*, State Canvassing Board Hearing, December 12, 2008 (statement of Anderson, J.). When fact-based allegations of electoral irregularities or improprieties can "only be decided by a court that could call in witnesses, hear evidence, and decide questions of law and fact," the

¹ Exhibit C identifies the "incident based" challenges asserted by the Franken Campaign and replaces earlier lists of challenges. Exhibit C, in addition, corrects a number of typographical errors in earlier lists of withdrawn challenges.

Minnesota Supreme Court has held that the questions are for judicial officers. *Taylor v. Taylor*, 10 Minn. 107 (1865).

The Franken Committee is prepared to release all "incident-based" challenges (identified in Exhibit C) upon the Board's clarification and direction with respect to such challenges.² Consistent with this Board's prior rulings, these issues would appear to be the proper subjects of an election contest proceeding where witnesses can be called and cross-examined, evidence can be weighed, and a fact-finder can decide questions of law and fact. If, on the other hand, such issues and challenges will be considered by *this Board*, the Franken Committee will preserve and present these challenges, and – as noted below – the Franken Committee respectfully requests the right to call and cross-examine witnesses, examine polling place documentation and machines, introduce exhibits and other evidence, and to present evidence regarding both its own "incident based" challenges, and the hundreds of such challenges asserted by the Coleman Campaign.

For the remaining challenges that can be resolved upon examination of the disputed ballot itself, the Franken Committee will be asserting its right under the Administrative Recount Procedures, as passed by the State Canvassing Board on November 18, 2008, to present the basis of each challenge. It further requests leave to present the basis of each challenge orally. The Franken Committee also expects to exercise its right to respond to each challenge made by the Coleman campaign, and again requests the right to do so orally.

² The Coleman Campaign, too, appears to seek direction from the Board with respect to whether such "incident based" challenges are properly before the Board. Press Release, "Coleman Campaign Intends to Present Board with less than 1,000 Challenges," Dec. 14, 2008 (attached as Exhibit D).

II. DISCUSSION

A. Pursuant To This Board's Prior Rulings, The State Canvassing Board Is Charged Simply With Recounting the Ballots Properly Cast and Determining Voter Intent With Respect to Individual Ballots

"The scope of an automatic or administrative recount is limited to the recount of the ballots cast and the declaration of the person nominated or elected." Minn. Admin. Code § 8235.0200. *See also* CJS Elections § 380 (Anderson, J.) (describing a canvassing board as "without judicial or quasi-judicial powers," but rather as "a neutral body whose duties are ministerial in nature").

Members of this Board have already stated, on two occasions, that they are restricted in their powers. The Final Recount Plan defines the Board's function as determining the proper outcome for each challenged ballot. As the Recount Plan, as adopted by this Board, makes clear, "Only the ballots cast in the election and the summary statements certified by the election judges may be considered in the recount process." To properly consider "incident based" challenges arising from complex and hotly disputed factual circumstances, the Board would be forced to consider evidence and testimony beyond that limited scope. Members of the Board have previously concluded that the Board has no such adjudicative power and that the Board is not well-suited to fact-intensive adjudication.

By contrast, such questions are regularly considered by courts in election contests in Minnesota. *See, e.g., Hancock v. Lewis*, 265 Minn. 519 (1963) (contestant alleged, among other things, that village clerk issued 21 absentee ballots for the election without requiring the voters to fill out the proper absentee ballot application and that election judges left the polling place at various intervals while the polls remained open for voting); *Nelson v. Bullard*, 155 Minn. 419 (1923) (court invalidated a vote in a precinct upon evidence that the

voter resided elsewhere); *McEwen v. Prince*, 125 Minn. 417 (1914) (court found that contestant failed to prove that three voters had their ballots marked by another person without first making the required oath that they were unable to mark their ballots by themselves).³

B. The Mass "Incident Based" Challenges Asserted In This Recount

As noted above, in addition to ballot-specific challenges relating to voter intent or distinguishing marks on a ballot, both campaigns have asserted hundreds of additional mass or blanket "incident based" challenges. These challenges arise from disputes or occurrences within dozens of counting centers, and involve hundreds of counting center officials, election observers and other witnesses, and a wide variety of circumstances, claims and counterclaims. Consistent with this Board's prior rulings, none of these challenges appear to be properly before this Board, which has expressed concerns over hearing the many witnesses and considering the ample evidence that might be necessary to resolve the myriad challenges

³ Such allegations are addressed in election contests in other states as well, as even a small sampling of such cases demonstrates. Courts in election contests regularly consider challenges to ballots that are facially valid, together with "incidents" or other error occurring in connection with an election. *See, e.g., Middleton v. Smith*, 539 S.E.2d 163 (Ga. 2000) (election contest considered validity of ballots cast at precinct where sheriff had mailed letters to voters urging them to vote for particular candidates, campaigned for said candidates at the poll, offered to "help" a convicted felon who performed community service at the sheriff's department if he would help the sheriff's candidates, offered to "help" a voter who was facing DUI charges, and prepared and distributed 38 absentee ballot applications); *Qualkinbush v. Skubisz*, 826 N.E.2d 1181 (Ill. Ct. App. 2004) (court found candidate's proffered testimony inadequate to establish chain of custody for three absentee ballots discovered in the wrong precinct); *Womack v. Foster*, 8 S.W.3d 854 (Ark. 2000) (upholding trial court's rejection of four absentee ballots after hearing testimony that the voters were incompetent); *Beckstrom v. Volusia County Canvassing Bd.*, 707 So.2d 720 (Fla. 1998) (in election contest, contestant claimed, among other things, that a number of absentee ballots remained absent and unaccounted for; that election officials failed to properly preserve all absentee ballots for which duplicates were made, that a number of duplicate ballots were unaccounted for; and that some absentee ballots were changed and/or misplaced, lost, or otherwise not counted as a result of fraud, gross negligence, or intentional wrongdoing); *Otworth v. Bays*, 98 N.E.2d 812 (Ohio 1951) (where first ten voters at precinct were accidentally given two ballots, court in election contest considered testimony of what had been done with extra ballot); *Helm v. State Election Bd.*, 589 P.2d 224 (Okla. 1979) (where voting machine programming error resulted in votes being recorded for the wrong candidate, court would consider voter testimony as proof of voter intent); *Bradley v. Jones*, 300 S.W.2d 1 (Ark 1957) (court in election contest, after hearing testimony that one of the candidates delivered a large brown manila envelope to an election official at the polling booth, considered voter testimony as to how each voter in precinct actually voted).

at issue. In the event that the Board is inclined to consider these mass challenges and engage in the necessary fact-finding, the Franken Committee provides the following overview of the issues that would be before the Board and the evidence that the Franken Committee would present with respect to each identified challenge.

1. Chain of Custody and Incident Challenges

Perhaps the most common of the mass challenges involve allegations of concerns relating to chain of custody, ballot security, and other counting and precinct-specific incidents. The counties themselves submitted over 90 incident reports to the Secretary of State during the recount process, many of them relating circumstances relevant to such allegations. The Franken Committee itself collected over 250 of its own reports regarding improper procedure, ballots that were found unsecured, ballot number discrepancies, and other issues. The Coleman Campaign, without a doubt, has its own collection of similar issues or concerns.

If the Board does wish to explore these issues, the Franken Committee provides below some of the issues that it would address to support its challenges, and the witnesses and evidence it would muster. In addition, the Franken Committee notes that some precincts will have to be re-opened to properly and consistently lodge challenges on these issues on a state-wide basis, as Deputy Recount Officials in many instances did not permit the campaigns to lodge such challenges in the first instance.

A full catalogue the incidents at issue would, of course, burden the Board with detail that is likely irrelevant and unnecessary. Nonetheless, to ensure that the Board apprehends

the range of evidence likely to be necessary to adjudicate such "incident based" challenges to otherwise entirely appropriate ballots, a short summary of a representative sample follows.⁴

- **Becker County:** Sixty-one ballots were found by the county auditor in the auditor's office after November 4th, which were then counted on November 25th.

Additionally, in Holmesville Township, four ballots were found in an unsealed container. The Secretary of State's office instructed county officials not to permit challenges based on these issues, and so the county will have to be re-opened to permit the ballots to be challenged.

- Evidence would include the precinct book, the machine tapes, and the ballots at issue.
 - Witnesses would include Ryan L. Tangen, the Auditor-Treasurer, and Josh Nussbaum and Trista Schwind, the Franken Committee representatives who observed the counting of these ballots.
- **Carver County:** There was a discrepancy regarding the number of ballots in Chaska Ward 3.
- Evidence would include the precinct book and the machine tapes.
 - Witnesses would include Laurie Engelen, the County Auditor, and Kent Berg, the Franken Committee representative who observed the counting of this precinct.

⁴ If the Board is inclined to undertake a review of these matters, the Franken Campaign would propose that the Board direct the parties to prepare and to file a comprehensive "pre-trial statement" identifying, for each of the challenges at issue, the necessary witnesses and exhibits necessary to a fair adjudication consistent with due process. Once the necessary witnesses and exhibits have been identified, the Board can scheduling the hearings necessary to entertain that evidence.

- **Clay County:** In Oakport Township, there was a discrepancy regarding the number of ballots.
 - Evidence would include the precinct book; the machine tapes; and the ballots at issue. The County also lodged an incident report.
 - Witnesses would include Lori Johnson, the Auditor-Treasurer, and Josh Nussbaum, the Franken Committee representative who observed the counting of this precinct.

- **Dakota County:** In Burnsville Precinct 7, one of the boxes of ballots temporarily went missing. Furthermore, it appears that some ballots were counted twice on election night, leading to a discrepancy between the machine totals and the actual number of ballots.
 - Evidence would include the precinct book, the machine tapes, and the ballots at issue.
 - Witnesses would include Joel Beckman, the Director of Property Taxation and Records, as well as the Franken Committee representatives present on site.

- **Dakota County:** In Inver Grove Heights Precinct 7, there was a discrepancy between the number of ballots counted on election night and the subsequent recounts, in which there appeared to be one more ballot than was originally counted on election night.
 - Evidence would include the precinct book, the machine tapes, and the ballots at issue. The County lodged an incident report that would also properly be entered into evidence.

- Witnesses would include Joel Beckman, the Director of Property Taxation and Records, and Bridget Cusick, the Franken Committee representative who observed the counting of this precinct.
- **Dakota County:** In Lakeville Precinct 5, nearly 300 ballots were missing after the first recount. They were later found. The Deputy Recount Official refused to entertain attempted challenges to these ballots based on security issues.
 - Evidence would include the precinct book, the machine tapes, and the ballots at issue. The County also lodged an incident report.
 - Witnesses would include Joel Beckman, the Director of Property Taxation and Records, and Bridget Cusick, Dan Traum, David Ralls, and Teresa Kusch, the Franken Committee representatives who observed the counting of this precinct.
- **Dakota County:** In Lakeville Precinct 10, there was a discrepancy regarding the number of ballots.
 - Evidence would include the precinct book and the machine tapes.
 - Witnesses would include Joel Beckman, the Director of Property Taxation and Records, and Bridget Cusick, Kristopher Morris, and Dan Traum, the Franken Committee representatives who observed the counting of this precinct.
- **Goodhue County:** The Franken Committee received allegations of unfair treatment by the election officials on site, which included said election officials refusing to lodge Franken challenges and permitting all Coleman challenges.

- Evidence would include all incident reports lodged by the county as well as the ballots that the officials would not permit to be challenged.
- Witnesses would include Carolyn Homsten, the Finance Directors, and Cory Kobbervig and Jeff Hauser, the Franken Committee representatives on site who observed the counting of this precinct.
- **Hennepin County:** In Brooklyn Park Ward C, Precinct 9, there were unexplained discrepancies in the ballots recounted.
 - Evidence would include the precinct book and the machine tapes.
 - Witnesses would include Sharon Knutson, the City Clerk, and Johnny Mathias, the Franken Committee representative who observed the counting of this precinct.
- **Hennepin County:** In Crystal, Ward 4, Precinct 2, there were absentee ballots that were accepted but then left sealed in their envelopes, and opened during the recount. The Coleman campaign challenged all of these ballots. It also appears that there may be a discrepancy regarding the number of ballots.
 - Evidence would include the precinct book, the machine tapes, and the ballots at issue.
 - Witnesses would include Janet Lewis, the City Clerk, and Emily Antin, the Franken Committee representative who observed the counting of this precinct.
- **Hennepin County:** In Minneapolis Ward 5, Precinct 5; Ward 7, Precinct 11; and Ward 11, Precinct 4, additional ballots were found after the conclusion of the recount in each respective precinct.

- Evidence would include the precinct book, the machine tapes, and the ballots at issue.
- Witnesses would include Cynthia Reichert, Director of Elections, and Matthew Grill, the Franken Committee representative who observed the counting of these precincts.
- **Hennepin County:** In Minneapolis Ward 8, Precinct 7, uncounted absentee ballots were discovered. The City has not yet recounted these ballots.
 - Evidence would include the precinct book, the machine tapes, and the ballots at issue.
 - Witnesses would include Cynthia Reichert, Director of Elections, and Matthew Grill, the Franken Committee representative who observed the counting of these precincts.
- **Hennepin County:** In Plymouth Ward 3, Precinct 18, there was a discrepancy regarding the number of ballots. A subsequent search of the vault and ballot machines did not yield additional ballots that would explain the discrepancy.
 - Evidence would include the precinct book and the machine tapes.
 - Witnesses would include Sandra Engdahl, the City Clerk, and Jordan Brandt, the Franken Committee representative who observed the counting of this precinct.
- **Hennepin County:** In Richfield Ward 1, Precinct 4, there was a discrepancy regarding the number of ballots.
 - Evidence would include the precinct book and the machine tapes.

- Witnesses would include Nancy Gibbs, the City Clerk, and Norah Deluhery, the Franken Committee representative who observed the counting of this precinct.
- **Hennepin County:** in Robbinsdale Ward 3, there was a discrepancy regarding the number of ballots.
 - Evidence would include the precinct book and the machine tapes.
 - Witnesses would include Tom Marshall, the City Clerk, and Rachel Wall, the Franken Committee representative who observed the counting of this precinct.
- **Itasca County:** In Grand Rapids Precinct 5, there was a discrepancy regarding the number of ballots.
 - Evidence would include the precinct book and the machine tapes.
 - Witnesses would include Marsha Goslovich, the Election Administrator, and Matt Scherer, the Franken Committee representative who observed the counting of this precinct.
- **Itasca County:** In Cohasset, a note was found that stated that four rejected absentee ballots were nonetheless counted. These rejected ballots were not subsequently identified or removed from the count.
 - Evidence would include the precinct book, the machine tapes, the note, and the ballots at issue.
 - Witnesses would include Marsha Goslovich, the Election Administrator, and Matt Scherer, the Franken Committee representative who observed the counting of this precinct.

- **Lake County:** In Beaver Bay, there was a discrepancy regarding the number of ballots.
 - Evidence would include the precinct book and the machine tapes.
 - Witnesses would include testimony from Steve McMahon, the Auditor-Treasurer, and Tony Sterle, the Franken Committee representative who observed the counting of this precinct.
- **Mower County:** In Austin Ward 1, Precinct 2, the county auditor physically altered the numbers on the election night tapes during the recount process to reflect newly-calculated voter totals.
 - Evidence would include the precinct book, the machine tapes, and the ballots at issue.
 - Witnesses would include Dave Groh, the County Auditor, and Emily Jensen and Josh Wilken-Simon, the Franken Committee representatives who observed the counting of this precinct.
- **Mower County:** During the Sergeant Township recount, and over the heated objection of Franken Committee recount lawyers and observers, the county auditor forced a Franken Committee representative to withdraw a challenge and sign a statement that she had done so voluntarily, after first requiring her to stand in the front of the room and publicly explain the basis of her challenges, which resulted in her emotional breakdown before the crowd of observers.
 - Evidence would include the precinct book and the machine tapes. The precinct must be re-opened to secure the challenge at issue.

- Witnesses would include Dave Groh, the County Auditor, Emily Jensen and Steve Keyser, the Franken Committee representatives who observed the counting of this precinct, and Emily Schmidt, the Franken Committee representative who was required to sign the statement described above.
- **Ramsey County:** During the first three days of the recount, county election officials instructed election judges to sort and count ballots simultaneously, which severely impeded the ability of campaign representatives to observe the accuracy and integrity of the recount process.
 - Evidence would include any instructions given to county personnel in Ramsey County regarding recount procedures.
 - Witnesses would include Joe Mansky, the Elections Director, and Susan Brand, Hassan Mian, Robert Yingst, and Ryan Greenwood, the Franken Campaign representatives who observed the counting at this site.
- **Scott County:** In Savage Precinct 7, there were five absentee ballots that do not appear to have been counted on election night. A box of ballots in this precinct was also found unsealed.
 - Evidence would include the precinct book, the machine tapes, and the ballots at issue in the unsealed container.
 - Witnesses would include Andy Lokken, the Elections Administrator, and John Wilken-Simon, the Franken Committee representative who observed the counting of this precinct.

- **Stearns County:** In St. Cloud Ward 3, Precinct 1, there was a discrepancy regarding the number of ballots.
 - Evidence would include the precinct book and the machine tapes.
 - Witnesses would include Randy Schreifels, the Auditor-Treasurer, and the Franken Committee representatives who observed the counting of this precinct.

- **Wright County:** Many ballots were never properly secured in Wright County. In particular, many of the original ballot envelopes were unsealed. In some precincts, election officials unsealed an envelope of original ballots outside of the presence of Committee representatives, and then resealed the envelopes.
 - Evidence would include the envelopes with the original ballots.
 - Witnesses would include State Director of Elections Gary Poser, and Bridget Cusick, the Franken Committee's lead representative at the site.

2. Challenges to Ballots from the Wrong Precinct

In addition to the numerous "chain of custody" and ballot security issues of the type described above, several of the "incident based" challenges involve instances in which absentee voters received, and utilized, ballots from the wrong precinct. Of course, ballots from all precincts place the Senate election in the same position on the ballot and all Minnesota voters were entitled to vote in the U.S. Senate election. Nonetheless, because of the error in utilizing ballots from the wrong precinct, both campaigns have challenged a number of these ballots. The Franken Committee will withdraw its challenges if the Board indicates that it will not consider challenges premised on an absentee voter utilizing a ballot from the wrong precinct. If the Board does wish to consider whether these ballots were

properly cast and counted, the Franken Committee, for its part, would intend to call the county election administrators from the jurisdictions involved and to present the ballots at issue in support of its challenges to these ballots.

3. Duplicate / Original Numerical Mismatch Challenges

Finally, a large number of challenges to otherwise properly cast ballots are premised on allegations of errors made by election administration staff in "duplicating" ballots that, because of damage to the original, were unable to be fed through the tabulation machines on election day. Under Minn. Stat. § 206.86, subd. 5, duplicate copies of original ballots are to be made when the original ballot "cannot be counted properly by the automatic tabulating equipment." Under the Administrative Recount Procedures passed by the Board on November 18, 2008, if an envelope of original ballots is found for a precinct, all duplicate ballots shall be segregated into a fourth pile, and the original ballots shall themselves be recounted.

It became apparent during the recount process that the number of duplicate ballots found and the number of original ballots cast in a given precinct did not always match. On November 19, 2008, Deputy Secretary of State Jim Gelbmann sent the following instructions to all election officials:

It is the opinion of our Office that Rule 9 is clear about the process to be used when duplicate ballots are found during the sorting process. Those ballots are to be removed from the sorting process and placed in a separate pile. If there is an envelope of original ballots, the original ballots should then be sorted. . . . While there is no requirement to compare the number of duplicate ballots to the number of original ballots, if there is an apparent significant discrepancy in the numbers, the candidates' representatives should attempt to agree on whether to sort the original or duplicate ballots. The Deputy recount official shall note on the incident log if the duplicates rather than

original ballots were counted. If the two candidate representatives can not agree, the Deputy Recount Official shall sort and count the original ballots.

Both campaigns were notified that the foregoing instruction would be issued, and neither campaign objected to the approach set forth in the Deputy Secretary of State's letter. Almost all locations correctly followed the procedure above.

Nevertheless, in some counting locations, the campaigns did challenge ballots when additional original ballots could not be matched to duplicates, or vice versa. In other locations, Deputy Recount Officials *did not permit* the campaigns to lodge challenges based on a mismatch between original and duplicate ballots. Thus, while some outstanding challenges to such ballots do exist arising from some counting centers, there are other, similarly situated counting centers, where no such challenges were permitted.

Perhaps more than any other single category of mass incident based challenges, these alleged "duplication" errors are uniquely factually based and complex and, for that reason, would require considerable testimony before this Board. For starters, of course, if the Board decides to consider whether any such challenges should be upheld, both campaigns should be permitted to reopen those precincts where Deputy Recount Officials did not permit challenges to original ballots that could not be matched to duplicates. That would, of course, entail re-sorting the original ballots in these precincts, matching the original ballots to the duplicate envelopes, and lodging additional challenges for the Board's consideration. In addition, in each instance, the local election judges and election administrators charged with conducting the duplication process will need to testify with respect to their process, their ballot duplication numbering, and the specific ballots at issue. Finally, recount officials and observers from both campaigns will be required to testify with respect to the originals and

duplicates located during the recount process and the handling and recounting of those ballots. There is, simply put, no other rational way to adjudicate these complex challenges without testimony and evidence from those with first hand knowledge of the original duplication process and the status and handling of those ballots during the recount process.

The Franken Committee understands that, in light of this Board's recent rulings, challenges of this sort have no place before this Board. This Board has ruled that it does not have sweeping, adjudicative powers in performing its duty to conduct the canvass, but rather is charged simply with recounting the ballots properly cast and determining voter intent with respect to individual ballots. The Board has repeatedly expressed its concerns over considering and resolving such hotly contested factual disputes. For these reasons, the Franken Committee is prepared to release such challenges and reserve these issues for adjudication in an election contest, should that be necessary.⁵

III. CONCLUSION

When the Board meets on Tuesday, December 16, to consider the campaigns' challenges to contested ballots, it should exclude from consideration all challenges premised on "incident-based" factual allegations as set forth above. Consideration of such issues would carry the Board beyond the bounds of its previously announced duties and into a realm of factually complex and time-intensive adjudication that can still be addressed in an election contest. In performing its duty to conduct the canvass, the Board should restrict its

⁵ In a few instances, recount locations refused to count original ballots to the extent they could not be matched with duplicate ballots, in contravention of the clear rules from the Deputy Secretary of State. In those instances, challenges to these ballots, which were initially and mistakenly placed in the "Other" pile, will be preserved by the Franken campaign, as these ballots should be counted. In a few counting locations, the Franken campaign was required by the Deputy Recount Official to challenge *all* duplicate or original ballots to preserve the issue. The Franken Campaign can see no procedural alternative but to maintain its challenges to the few Franken ballots that were challenged during this process to ensure that these votes can be counted for Franken.

focus to its previously announced prescribed task of recounting the ballots properly cast and determining voter intent with respect to individual ballots.

While the Franken Committee preserves its right to pursue "incident-based" challenges, it is prepared to waive all such challenges at this time (and to preserve them for an election contest, should one be filed by either campaign) upon clarification from this Board with respect to these mass "incident based" challenges. Alternatively, if the Board does wish to consider these issues, the Franken Committee requests access to the evidence and testimony described above, including the ability to reopen precincts where election officials did not permit challenges to be lodged on these bases.

Dated: December 15, 2008

Respectfully submitted,



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**Pro hac vice motions pending*

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EXHIBIT C

county	pct	challengeNum
Anoka	LEXINGTON P-1	
Anoka	RAMSEY W-1 P-1	10
Anoka	RAMSEY W-1 P-1	11
Cass	LOON LAKE TWP	1
Chippewa	CRATE TWP	1
Dakota	APPLE VALLEY P-14	1
Dakota	APPLE VALLEY P-14	2
Dakota	APPLE VALLEY P-15	1
Dakota	BURNSVILLE P-01	2
Dakota	BURNSVILLE P-01	3
Dakota	BURNSVILLE P-02	2
Dakota	BURNSVILLE P-02	3
Dakota	BURNSVILLE P-02	4
Dakota	BURNSVILLE P-02	5
Dakota	BURNSVILLE P-05	2
Dakota	BURNSVILLE P-11	1
Dakota	BURNSVILLE P-11	2
Dakota	BURNSVILLE P-11	3
Dakota	BURNSVILLE P-11	4
Dakota	BURNSVILLE P-15	10A
Dakota	BURNSVILLE P-15	13A
Dakota	BURNSVILLE P-15	2A
Dakota	BURNSVILLE P-15	3A
Dakota	BURNSVILLE P-15	4A
Dakota	BURNSVILLE P-15	5A
Dakota	BURNSVILLE P-15	8A
Dakota	EAGAN P-03	2
Dakota	EAGAN P-03	3
Dakota	EAGAN P-03	4
Dakota	EAGAN P-03	5
Dakota	EAGAN P-03	6
Dakota	EAGAN P-03	7
Dakota	EAGAN P-04	2
Dakota	EAGAN P-04	6
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Dakota	EAGAN P-05	11
Dakota	EAGAN P-05	12
Dakota	EAGAN P-05	13
Dakota	EAGAN P-05	15
Dakota	EAGAN P-05	17
Dakota	EAGAN P-05	2
Dakota	EAGAN P-05	3
Dakota	EAGAN P-09	4
Dakota	EAGAN P-11	1
Dakota	EAGAN P-11	10
Dakota	EAGAN P-11	13
Dakota	EAGAN P-11	14
Dakota	EAGAN P-11	15
Dakota	EAGAN P-11	2
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Dakota	EAGAN P-11	4
Dakota	EAGAN P-11	5
Dakota	EAGAN P-11	6
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Dakota	EAGAN P-11	8
Dakota	EAGAN P-11	9
Dakota	EAGAN P-12	10
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Dakota	EAGAN P-12	7
Dakota	EAGAN P-12	8

Dakota	EAGAN P-16	11
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Dakota	EAGAN P-16	14
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Dakota	EAGAN P-16	6
Dakota	EAGAN P-16	8
Dakota	FARMINGTON P-2	1
Dakota	FARMINGTON P-5	4
Dakota	HASTINGS W-3 P-2	4
Dakota	INVER GROVE HTS P-06	1
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Dakota	LAKEVILLE P-05	19
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Dakota	LAKEVILLE P-06	1
Dakota	LAKEVILLE P-06	3
Dakota	LAKEVILLE P-09	2
Dakota	LAKEVILLE P-09	3

Dakota	LAKEVILLE P-10	1
Dakota	LAKEVILLE P-11	3
Dakota	LAKEVILLE P-11	4
Dakota	LAKEVILLE P-11	5
Dakota	MENDOTA HTS P-2	10
Dakota	MENDOTA HTS P-2	2
Dakota	MENDOTA HTS P-2	3
Dakota	MENDOTA HTS P-2	4
Dakota	MENDOTA HTS P-2	5
Dakota	MENDOTA HTS P-2	6
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Dakota	MENDOTA HTS P-2	8
Dakota	MENDOTA HTS P-2	9
Dakota	MENDOTA HTS P-4	2
Dakota	MENDOTA HTS P-4	3
Dakota	ROSEMOUNT P-2	1
Dakota	ROSEMOUNT P-2	10
Dakota	ROSEMOUNT P-2	11
Dakota	ROSEMOUNT P-2	12
Dakota	ROSEMOUNT P-2	13
Dakota	ROSEMOUNT P-2	15
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Dakota	ROSEMOUNT P-4	31
Dakota	ROSEMOUNT P-4	33
Dakota	ROSEMOUNT P-4	35
Dakota	ROSEMOUNT P-4	36
Dakota	WEST ST PAUL W-3 P-3	2
Dakota	WEST ST PAUL W-3 P-3	3
Goodhue	ROSCOE TWP	1
Hennepin	BLOOMINGTON W-1 P-14	1-F
Hennepin	BLOOMINGTON W-1 P-14	7-F
Hennepin	BLOOMINGTON W-1 P-15	1-F
Hennepin	BLOOMINGTON W-1 P-15	2-F
Hennepin	BLOOMINGTON W-2 P-13	2
Hennepin	BLOOMINGTON W-2 P-21	2-F
Hennepin	BLOOMINGTON W-2 P-21	3-F
Hennepin	BLOOMINGTON W-2 P-27	1-F
Hennepin	BLOOMINGTON W-2 P-27	2-F
Hennepin	BLOOMINGTON W-2 P-27	3-F
Hennepin	BLOOMINGTON W-3 P-29	1
Hennepin	BLOOMINGTON W-3 P-29	2
Hennepin	BLOOMINGTON W-4 P-31	1-F
Hennepin	BROOKLYN CENTER P-02	10
Hennepin	BROOKLYN CENTER P-02	11

I foofqjo	CSPPLMZOIDFOUFSIQ 13	23
I foofqjo	CSPPLMZOIDFOUFSIQ 13	25
I foofqjo	CSPPLMZOIDFOUFSIQ 13	26
I foofqjo	CSPPLMZOIDFOUFSIQ 13	9
I foofqjo	CSPPLMZOIDFOUFSIQ 13	:
I foofqjo	CSPPLMZOIDFOUFSIQ 18	27
I foofqjo	CSPPLMZOIDFOUFSIQ 18	28
I foofqjo	CSPPLMZOIDFOUFSIQ 18	29
I foofqjo	CSPPLMZOIDFOUFSIQ 18	2:
I foofqjo	CSPPLMZOIDFOUFSIQ 18	31
I foofqjo	CSPPLMZOIDFOUFSIQ 18	32
I foofqjo	CSPPLMZOIDFOUFSIQ 18	33
I foofqjo	CSPPLMZOIDFOUFSIQ 18	34
I foofqjo	CSPPLMZOIDFOUFSIQ 18	35
I foofqjo	CSPPLMZOICBSL X DIQ 13	3
I foofqjo	CSPPLMZOICBSL X DIQ 13	4
I foofqjo	CSPPLMZOICBSL X DIQ 19	3
I foofqjo	CSPPLMZOICBSL X DIQ 1:	3
I foofqjo	CSPPLMZOICBSL X FIQ 15	2
I foofqjo	CSPPLMZOICBSL X FIQ 19	2
I foofqjo	CSPPLMZOICBSL X FIQ 19	3
I foofqjo	CSPPLMZOICBSL X FIQ 19	4
I foofqjo	CSPPLMZOICBSL X X IQ 12	2
I foofqjo	CSPPLMZOICBSL X X IQ 12	3
I foofqjo	DSZTUBMX .5IQ 13	6
I foofqjo	FEFOICBSJ.SFIQ 28	
I foofqjo	FEJOBQ 22	4
I foofqjo	HPMEFOVBMFZIQ 15	5
I foofqjo	HPMEFOVBMFZIQ 15	6
I foofqjo	HPMEFOVBMFZIQ 15	7
I foofqjo	HPMEFOVBMFZIQ 15	8
I foofqjo	I PQL JOTIQ 12	5
I foofqjo	I PQL JOTIQ 12	6
I foofqjo	I PQL JOTIQ 12	6
I foofqjo	I PQL JOTIQ 12	7
I foofqjo	I PQL JOTIQ 12	9
I foofqjo	I PQL JOTIQ 17	23
I foofqjo	NJOFBCPMJT X 21IQ 13	2
I foofqjo	NJOFBCPMJT X 22IQ 16	2
I foofqjo	NJOFBCPMJT X 22IQ 18	:
I foofqjo	NJOFBCPMJT X 22IQ 19	26
I foofqjo	NJOFBCPMJT X 22IQ 19	27
I foofqjo	NJOFBCPMJT X 22IQ 19	28
I foofqjo	NJOFBCPMJT X 23IQ 18	4
I foofqjo	NJOFBCPMJT X 24IQ 14	2
I foofqjo	NJOFBCPMJT X 24IQ 18	2
I foofqjo	NJOFBCPMJT X 24IQ 18	3
I foofqjo	NJOFBCPMJT X 3IQ 16	2
I foofqjo	NJOFBCPMJT X 5IQ 19	3
I foofqjo	NJOFBCPMJT X 5IQ 19	4
I foofqjo	NJOFBCPMJT X 6IQ 16	8
I foofqjo	NJOFBCPMJT X 8IQ 17	2
I foofqjo	NJOFBCPMJT X : IQ 13	7
I foofqjo	NJOFUPOL B X 5IQ D	22
I foofqjo	NJOFUPOL B X 5IQ D	6
I foofqjo	NJOFUPOL B X 5IQ D	7
I foofqjo	NJOFUPOL B X 5IQ D	8
I foofqjo	NJOFUPOL B X 5IQ D	9
I foofqjo	NJOFUPOL B X 5IQ D	:
I foofqjo	NJOFUPOL B X 5IQ G	5
I foofqjo	NJOFUPOL B X 5IQ H	3
I foofqjo	OFX II PCFIQ 140	2
I foofqjo	S.DI GFME X 3IQ 13	6
I foofqjo	S.DI GFME X 3IQ 13	7
I foofqjo	S.DI GFME X 3IQ 13	8
I foofqjo	S.DI GFME X 3IQ 13	9

I foofqjo	S.DI GFME X 3IQ 13	
I foofqjo	S.DI GFME X 3IQ 13	
I foofqjo	S.DI GFME X 3IQ 13	
I foofqjo	S.DI GFME X 3IQ 13	
I foofqjo	SPCCJOTEBMF X 2	3G
I foofqjo	TUBOUI POZIQ 12	23
I foofqjo	TUBOUI POZIQ 12	24
I foofqjo	TUIMPVJTICBSL X 4IQ 23	22
I foofqjo	TUIMPVJTICBSL X 4IQ 23	3
I foofqjo	TUIMPVJTICBSL X 4IQ 23	5
I foofqjo	TUIMPVJTICBSL X 4IQ 23	9
I foofqjo	TUIMPVJTICBSL X 4IQ 23	:
I foofqjo	TUIMPVJTICBSL X 5IQ 25	2
I foofqjo	U POL BICBZIQ 12	2
I foofqjo	U POL BICBZIQ 12	3
L ppcđ jđđ joh	JOUNGBMMFI FB TUX BSE	6
L ppcđ jđđ joh	JOUNGBMMFI FB TUX BSE	7
L ppcđ jđđ joh	JOUNGBMMFI FB TUX BSE	8
L ppcđ jđđ joh	JOUNGBMMFI X FTUX BSE	27
N px fs	BVTUUD X 2IQ 3	22
N px fs	TBSHFBOULX Q	24
Ojđprfu	TUICFUSIX 2IQ 3	4
Ojđprfu	TUICFUSIX 2IQ 3	5
Pm tđe	DBTDBEF UX QIQ 2	33
Sbn tfz	MUUMFIDBOBEBIQ 4	2
Sbn tfz	SPTFWMMFIQ 12	22
Sbn tfz	SPTFWMMFIQ 12	9
Sbn tfz	SPTFWMMFIQ 13	3
Sbn tfz	SPTFWMMFIQ 13	
Sbn tfz	SPTFWMMFIQ 21	21
Sbn tfz	TI PSFWFX IQ 6	
Sbn tfz	TI PSFWFX IQ 6	
Sbn tfz	TUICBVMX 4IQ 25	3
Sbn tfz	TUICBVMX 7IQ 12	2
Sbn tfz	TUICBVMX 8IQ 16	23
Sbn tfz	X I JUFICFBSIUX QQ 2	5
TbjouMpvjt	EVM/UI IQ 15	
TbjouMpvjt	EVM/UI IQ 29	8
TbjouMpvjt	EVM/UI IQ 38	4
TbjouMpvjt	EVM/UI IQ 3:	4
TbjouMpvjt	EVM/UI IQ 3:	5
TbjouMpvjt	EVM/UI IQ 3:	6
TbjouMpvjt	I JCCJOHIQ I:	2G
TbjouMpvjt	I JCCJOHIQ I:	3G
TbjouMpvjt	I JCCJOHIQ I:	4G
TbjouMpvjt	I JCCJOHIQ 22	2
TbjouMpvjt	I JCCJOHIQ 22	3
TbjouMpvjt	I JCCJOHIQ 22	9
TbjouMpvjt	NJEX BZ UX Q	2G
TbjouMpvjt	TPMX BZ UX Q	2
TbjouMpvjt	WSHJO.BIQ 12	5
TbjouMpvjt	WSHJO.BIQ 12	6
TbjouMpvjt	WSHJO.BIQ 12	7
TbjouMpvjt	WSHJO.BIQ 12	8
Tđpw	QSJPSIMBLFIQ 6	21
Tđpw	QSJPSIMBLFIQ 6	22
Tđpw	QSJPSIMBLFIQ 6	9
Tđpw	QSJPSIMBLFIQ 6	:
Tđpw	TBVBHFIQ 8	22
Tđpw	TBVBHFIQ 8	23
Tđpw	TBVBHFIQ 8	26
Tđpw	TBVBHFIQ 8	27
Tđpw	TBVBHFIQ 8	9
Tđpw	TBVBHFIQ 8	:
Tđpw	TCSJOHIMBLFIUX Q	2
Tđpw	TCSJOHIMBLFIUX Q	4

Ti fscvsaf	FM ISJWFSIX 3IQBC	923
Tdfwof	TXBOIMBLFIUX Q	4
X bti johupo	DPULBHFIHSPWFIQ23	24
X bti johupo	TUMMKBUFS X 3IQ4	4:
X bti johupo	X PPECVSZIQ22	: 5
X bti johupo	X PPECVSZIQ22	: 6
X bti johupo	X PPECVSZIQ22	: 7
X bti johupo	X PPECVSZIQ22	: 8
X bti johupo	X PPECVSZIQ22	: 9
X bti johupo	X PPECVSZIQ24	218
X bti johupo	X PPECVSZIQ24	