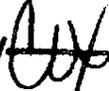


FILED
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By  Deputy

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STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

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

District Court File No. 62-CV-09-56

Cullen Sheehan and Norm Coleman,

Contestants,

vs.

Al Franken,

Contestees.

Dennis Peterson, et. al.,

Petitioners,

Supreme Court File No. A09-65

vs.

Mark Ritchie, Minnesota Secretary of State, et. al.,

Respondents.

**PETITIONERS' MEMORANDUM OF LAW IN OPPOSITION TO
MOTION FOR CLASS CERTIFICATION**

INTRODUCTION

Intervenor Norm Coleman's motion for class certification to assert, in Petitioners' § 204B.44 petition, claims on behalf of a class of 12,000 Minnesota voters whose absentee ballots were rejected should be denied because: (1) all parties were not served and have not had a fair opportunity to respond to the motion; (2) there is no class action mechanism under § 204B.44;

(3) reverse class certification is not applicable; and (4) Coleman fails to satisfy any of the requirements for a class action under Rule 23.01 and Rule 23.02.

BACKGROUND

On January 13, 2009, Petitioners filed a petition in the Minnesota Supreme Court, pursuant to Minn. Stat. § 204B.44, to request that their absentee ballots be accepted, opened, and counted. On January 15, 2009, Norm Coleman (“Coleman”) moved to intervene in the § 204B.44 petition. Coleman argued that intervention was necessary to “protect his interests” because “the Petition threatens to undermine the [§ 209] contest action already underway” Motion of Norm Coleman to Intervene (January 15, 2009) at ¶ 3.

The Minnesota Supreme Court granted Coleman’s motion to intervene as a respondent. Order, January 16, 2009, at ¶ 2. In addition, the Court noted that:

[t]he relief sought in the petition requires a determination whether the absentee ballot submitted by each petitioner complied with the legal requirements for such ballots and was therefore improperly rejected by local election officials. Judicial efficiency and the interests of justice will be better served if the claims presented in this matter are addressed by the three-judge district court panel in the election contest pending in Ramsey County District Court.

Id. 1-2. The Minnesota Supreme Court referred the § 204B.44 petition to this Court. *Id.* at ¶ 3.

On January 23, 2009, Intervenor-Respondent Coleman moved for class certification. Notice of Motion and Motion (dated January 22, 2009, but filed January 23, 2009) (“Motion”). Coleman seeks “reverse” class certification of a class of approximately 12,000 Minnesota voters whose absentee ballots were rejected. *See* Memorandum of Law (January 23, 2009) submitted in support of Coleman’s motion for class certification (“Coleman Brf.”) at 2-3. Petitioners submit this memorandum of law in opposition to Coleman’s motion for class certification.

ARGUMENT

I. COLEMAN'S MOTION SHOULD BE DENIED BECAUSE IT WAS NOT SERVED ON ALL PARTIES.

Every written motion other than a motion that may be heard ex parte "shall be served upon each of the parties." Minn. R. Civ. P. 5.01. Coleman's motion for class certification was served on counsel for Contestee Al Franken and on counsel for Petitioners. *See* Affidavit of Service (January 23, 2009). It was not, however, served on any of Coleman's fellow respondents: Secretary of State Mark Ritchie and 18 Minnesota counties. *See id.*

Because 19 respondents have not received fair notice and opportunity to respond, Coleman's motion for class certification should be denied.

II. THERE IS NO CLASS ACTION MECHANISM UNDER MINN. STAT. § 204B.44.

Coleman's motion also should be denied because there is no class action mechanism available under § 204B.44.

Notwithstanding the Minnesota Supreme Court's referral of the § 204B.44 petition to this Court, it remains a § 204B.44 petition.¹ The applicable statute specifically provides that any "individual" may file a petition in the Minnesota Supreme Court. Minn. Stat. § 204B.44. It does not authorize a class action.

The absence of a class action mechanism in the context of a § 204B.44 petition is understandable given the fundamentally personal nature of the right to vote and the decision whether to challenge election errors, the inherent conflicts that would exist among any disparate class of voters (discussed more fully below in the context of Rule 23.01(c) and Rule 23.01(d)), and the likelihood that class members would not have an opportunity to opt-out if the class were

¹ Significantly, the Minnesota Supreme Court did not deny the petition for lack of jurisdiction nor direct Petitioners to re-file as an election contest under Minn. Stat. § 209. The parties' subsequent pleadings in this Court have retained the Minnesota Supreme Court caption and court file number in addition to the election contest caption and court file number.

certified under Minn. R. Civ. P. 23.02(a) or 23.02(b). *See* Minn. R. Civ. P. 23.03(b)(2)(E) (mandatory opt-out right only in classes certified under 23.02(c)).

Further, the Minnesota Rules of Civil Appellate Procedure do not provide a mechanism to alter the individual nature of matters filed in the Minnesota Supreme Court. Interested persons not parties to a petition in the Minnesota Supreme Court are limited to requesting leave to participate as *amicus curiae*. *See* Minn. R. Civ. App. P. 129.01.

In the absence of authority under Minn. Stat. § 204B.44 or the Minnesota Rules of Civil Appellate Procedure to newly certify a class in a matter over which the Minnesota Supreme Court has acknowledged jurisdiction, Coleman’s motion for class certification must be denied.²

III. REVERSE CLASS CERTIFICATION IS NOT APPLICABLE BECAUSE COLEMAN HAS NO CLAIM AGAINST A CLASS OF VOTERS WHOSE ABSENTEE BALLOTS WERE REJECTED.

In addition, Coleman’s motion should be denied because reverse class certification is not applicable.

There are two types of “reverse” class actions: (1) a defendant in a pending action counterclaims against and seeks to certify a class of plaintiffs, *see, e.g., Blake v. Arnett*, 663 F.2d 906, 911-12 (9th Cir. 1981); *Frederick County Fruit Growers Assoc., Inc. v. Dole*, 709 F. Supp. 242, 245 (D.D.C. 1989); *Bray v. City of New York*, 346 F. Supp.2d 480, 486 (S.D.N.Y. 2004); or (2) a prospective defendant sues (as plaintiff), in a preemptive strike, for a declaration of rights

² Even if the petition were converted to a § 209 election contest, class certification is not authorized. Section 209, which applies to election contests, provides that “[a]ny eligible voter” may bring an election contest. Minn. Stat. § 209.02, subd. 1. It does not authorize class action election contests. Moreover, the Minnesota Rules of Civil Procedure specifically provide that “[t]hese rules” -- including Rule 23 -- “do not govern pleadings, practice and procedure” in proceedings brought under Minn. Stat. § 209 “insofar as they are inconsistent or in conflict with the rules.” Minn. R. Civ. P. 81.01(a) and Appendix A. Rule 23 class actions are inconsistent or in conflict with election contest proceedings because they infringe on voters’ individual rights to decide whether to contest an election.

or nonliability and seeks to certify prospective plaintiffs as a class of defendants. *See, e.g., In re Joint Eastern and Southern District Asbestos Litig.*, 14 F.3d 726 (9th Cir. 1993); *Rexam Inc. v. United Steel Workers of America, AFL-CIO-CLC*, 2005 WL 1260914, at *2 (D. Minn. May 25, 2005) (Attached to the Affidavit of Charles N. Nauen (“Nauen Aff.”) as Exhibit A); *City of Rochester v. Chiarella*, 467 N.Y.S.2d 948, 950 (N.Y. Sup. Ct. 1983), *aff’d* 470 N.Y.S.2d 181 (N.Y.A.D. 1983); *Genessee Hospital v. Allied Office Products, Inc.*, 749 N.Y.S.2d 355 (N.Y. Sup. Ct. 1983).

Both types of reverse class actions require the movant to assert its own justiciable claim against the putative class members. If there is no case or controversy, the movant lacks a threshold requirement for class certification. *See Genessee Hospital*, 749 N.Y.S.2d at 362 (denying reverse class certification because “Plaintiffs’ complaint and moving papers” failed “the justiciability test”); *cf. In re Joint Eastern and Southern District Asbestos Litig.*, 14 F.3d at 733 (dismissing putative reverse class action because plaintiff (prospective defendant) had no claim against putative class). To permit an intervenor to hijack an action by certifying a class of potential plaintiffs against whom the intervenor has no cognizable claim would be unprecedented and clear error.

Coleman, an intervening respondent, characterizes his motion as one for “reverse class action” certification. *See Coleman Brf.* at 2-3. He seeks to certify a class of voters whose absentee ballots have been rejected, i.e., a class of petitioners. *See id.* at 2 (“[c]ertification of a class consisting of thousands of Absentee Voters is . . . clearly appropriate”); Affidavit of Joseph S. Friedberg (January 22, 2009) (“Friedberg Aff.”) at ¶ 4 (equating putative class members with “Petitioners”).

Coleman's motion for reverse class certification suffers a fatal threshold problem: Coleman has no possible claim against putative class members, and putative class members have no possible claim against Coleman. The only claims in this § 204B.44 petition are claims by voters against election officials for improperly rejecting the voters' absentee ballots. In other words, there is no case or controversy between Coleman and the putative class. Therefore, Coleman's motion for class certification fails the justiciability test and must be denied.

IV. COLEMAN FAILS TO SATISFY THE REQUIREMENTS OF RULE 23.

Even if there were authority to certify a class in connection with Petitioners' § 204B.44 petition, and even if reverse class certification were applicable, Coleman's motion must be denied because he fails to satisfy the requirements of Rule 23.

A putative class may be certified only if the Court is satisfied "after a rigorous analysis, that the prerequisites of [Rule 23] have been satisfied." *Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 161 (1982). The movant bears the burden of demonstrating that the putative class meets each of the four requirements under Minn. R. Civ. P. 23.01 and one of the requirements under Minn. R. Civ. P. 23.02. *Kochlin v. Norwest Mortgage, Inc.*, 2001 WL 856206, *3 (Minn. Ct. App. July 31, 2001) (Nauen Aff. Ex. B); *cf. Good v. Ameriprise Financial, Inc.*, 248 F.R.D. 560, 569 (D. Minn. 2008) (referring to Fed. R. Civ. P. 23).

As discussed below, Coleman fails to satisfy his burden with respect to both Rule 23.01 and Rule 23.02. Therefore, his motion for class certification must be denied.

A. Coleman Fails To Satisfy The Four Requirements Of Rule 23.01.

1. Coleman has not established that the putative class is so numerous that joinder is impracticable.

The first criteria of Rule 23.01 requires the movant to establish that the putative class members are so numerous that joinder is impracticable. Minn. R. Civ. P. 23.01(a). Coleman's

contention that a class of 12,000 geographically-scattered absentee voters necessarily satisfies the first criteria of Rule 23.01, *see* Coleman Brf. at 4, is oversimplified and is based on the questionable assumption that 12,000 voters could comprise a single class.³

It is fundamental that every certified class must have a class representative. The class representative must have “individual standing to raise the legal claims of the class.” *Prado-Stiman v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000); *see also Falcon*, 457 U.S. at 156 (“a class representative must be part of the class and possess the same interest and suffer the same injury as the class members”) (internal quotation marks and citation omitted); *Roby v. St. Louis Southwestern Railway Co.*, 775 F.2d 959, 961 (8th Cir. 1985) (a class representative must be a member of the class he or she seeks to represent).

It is doubtful that a class representative whose absentee ballot was rejected by election officials in one county has standing to raise the legal claims of voters whose absentee ballots were rejected by election officials in other counties. Consequently, class certification might very well require 87 sub-classes, one for each Minnesota county, and 87 sub-class representatives.

If sub-classes are necessary, each sub-class must independently satisfy the numerosity requirement as well as each of the other three requirements of Rule 23.01. *Roby*, 775 F.2d at 961. Coleman has not presented evidence sufficient to determine whether each of 87 potential sub-classes would be comprised of enough voters to make joinder impracticable. Therefore, Coleman fails to meet the numerosity requirement for class certification.

³ Given the Court’s February 3, 2009, Order granting in part and denying in part Contestee’s Motion in Limine to Limit Absentee-Ballot Evidence to Ballots Pleaded in the Notice of Contest, the number of putative class members may be less than 12,000. Regardless of the exact number, the following analysis applies.

2. Coleman has not established that there are disputed questions of law or fact common to the class.

The second criteria under Rule 23.01 requires the movant to show that there are questions of law or fact common to the class. Minn. R. Civ. P. 23.01(b). Not every common question of law or fact satisfies the commonality requirement. “There must be a *consequential* question of law or fact that applies to every single member of the class and that can be answered the same way with respect to every single member of the class.” *Good*, 248 F.R.D. at 569 (emphasis original). Further, “[w]hen resolution of a common legal issue is dependent upon factual determinations that will be different for each purported class plaintiff, . . . courts have consistently refused to find commonality and have declined to certify a class action.” *Rexam*, 2005 WL 1260914 at *4 (internal quotation marks and citation omitted).

In *Good*, the plaintiffs identified what they alleged to be numerous common issues of law and fact that boiled down to a single issue: Whether the defendant breached contracts to pay commissions. *Good*, 248 F.R.D. at 570, 572. The court noted that this was the ultimate question in the litigation and was, “in the abstract,” common to every member of the class. *Id.* at 570. Nevertheless, to answer this common question required the examination of numerous different contracts. “The bottom line,” the court concluded, “is that, while there are undoubtedly many questions of law and fact that are common to *many* members of the putative class, there is no single question of law or fact at least any question of consequence -- that is common to *every* member of the putative class.” *Id.* at 573 (emphasis original). Therefore, the plaintiffs failed to meet the commonality requirement for class certification.

Similarly in this case, Coleman attempts to satisfy the commonality requirement based on an ultimate issue: Whether the putative class members’ absentee ballots were wrongfully rejected. *See* Coleman Brf. at 5. However, just as in *Good*, this issue is common to members of

the putative class only in an abstract sense. To answer it would require the examination of each and every one of the rejected absentee ballot envelopes and thousands upon thousands of the absentee ballot applications, voter registration cards, and other evidence. In addition, hundreds, if not thousands, of election officials may be required to testify and explain the reasons why these absentee ballots were rejected.

Moreover, the fact that the same statutory standards apply to determine whether to accept or reject all absentee ballots is undisputed and, therefore, cannot serve to satisfy the commonality requirement. *See In re Objections and Defenses to Real Property Taxes for 1980 Assessment*, 335 N.W.2d 717, 719 (Minn. 1983) (no commonality when common questions were undisputed, leaving only inherently individual issues); *Nolan v. State Farm Mutual Automobile Ins. Co.*, 355 N.W.2d 492, 493 (Minn. Ct. App. 1984) (no commonality when question of law was decided in another case, leaving only inherently individual issues). The issue presented here does not challenge the undisputed statutory standards, it challenges the application of these standards to individual ballots. And, as the Court recently noted, this issue cannot be decided simply by reviewing the face of the ballot envelopes. Order on Contestants' Motion for Summary Judgment (February 3, 2009) at 10. It requires "a full evidentiary hearing." *Id.* at 11.

Further, Coleman repeatedly has asserted in other contexts that there is no commonality when it comes to the application of statutory standards to rejected absentee ballots. *See* Contestants' Memorandum of Law in Support of Motion for Summary Judgment (January 21, 2009) at 2 ("local officials did not apply standards consistently in accepting or rejecting ballots"); *id.* at 3 ("Counties applied standards inconsistently for every category of information on the envelopes"); *id.* at 12 ("counties applied the standards inconsistently and some counties refused to engage in the recommended [rejected absentee ballot sorting] process at all"); *id.* at 16

(“the statutory criteria for rejecting absentee ballots . . . were applied differently in different counties on election night”); *id.* at 17 (“apply varying standards, election officials excluded approximately 11,000 absentee ballots”).

In addition, the Minnesota Supreme Court, in referring this petition to this Court, presumed the absence of commonality when it directed this Court to make a ballot-by-ballot review. It stated: “The relief sought in the petition requires a determination whether the absentee ballot submitted by *each* petitioner complied with the legal requirements for such ballots and therefore was improperly rejected by local officials.” Order, January 16, 2009, at 1 (emphasis added).

In sum, there is no question of law or fact that can be answered the same way for every putative class member. Resolving whether each of the ballots was properly rejected would depend on individual factual determinations. Therefore, Coleman fails to meet the commonality requirement for class certification.

3. Coleman has not established that the claims of representative parties are typical of claims of the class.

The third criteria under Rule 23.01 requires the movant to show that the claims of the representative parties are typical of the claims of putative class members. Minn. R. Civ. P. 23.01(c). To satisfy the typicality requirement, the class representative must “have an interest compatible with that of the class sought to be represented.” *Ario v. Metropolitan Airports Comm’n*, 367 N.W.2d 509, 513 (Minn. 1985) (citation omitted). The rationale for this requirement “is that a plaintiff with typical claims will pursue his or her own self-interest in the litigation, and in doing so, will advance the interests of the class members, which are aligned with those of the representative.” 1 Alba Conte & Herbert Newberg, *Newberg on Class Actions*, § 3.13, at 325 (4th ed. 2002). Any potential for rivalry or conflict that may jeopardize the

interest of the class weighs against finding typicality. *Ario*, 367 N.W.2d at 513; *Blake*, 663 F.2d at 913 (proposed representatives were not typical/adequate because their interests did not “coincide precisely” with those of the putative class). Further, conclusory and speculative assertions of typicality do not satisfy a movant’s burden. 1 *Conte & Newberg, supra*, § 3.15, at 361 (to satisfy the requirement of typicality, the plaintiff must offer more than a “conclusory assumption that the litigation involves inherent class claims.”); *Alston v. Va. High Sch. League, Inc.*, 184 F.R.D. 574, 578 (W.D. Va. 1999) (“If the mere allegation that discriminatory practices in general cause injury to all members of the class could suffice to show typicality, the typicality requirement would be eviscerated . . .”).

In this case, Coleman’s assertions of typicality do not even rise to the level of conclusory and speculative. Coleman does not identify a proposed class representative whose claims are typical. Instead, Coleman invites the Court to “determine the proper class representative.” Coleman Brf. at 5. It is the movant’s obligation to propose a class representative whose claims are typical of the claims of the class. In shirking this obligation, Coleman fails to satisfy the typicality requirement.

Coleman’s failure to identify a class representative is understandable. The only potential choices are the current parties to this petition: Petitioners, Intervenor Coleman, and election officials. Coleman cannot represent a class of rejected absentee voters because he is not a member of the putative class. *See Roby*, 775 F.2d at 961 (representatives in a class action must be members of the class they seek to represent). Further, Coleman’s interests definitely conflict with the interests of a putative class of petitioners. Coleman moved to intervene in the petition because it allegedly “threatens to undermine the contest action . . .,” Motion of Norm Coleman to Intervene (January 15, 2009) at ¶ 3, and the Minnesota Supreme Court’s Order granting

Coleman's motion designated Coleman as a "respondent," not a petitioner. Obviously, Coleman would have a strong disincentive to vigorously pursue the interests of putative class members whose claims allegedly are virtually identical to the claims of Petitioners, who allegedly threaten to undermine Coleman's § 209 election contest. *See* Coleman Brf. at 2 (putative class members are "similarly situated" to Petitioners and "clearly desire the same relief").⁴

The only other possible class representatives, Petitioners, advance individual claims and express no interest in representing a class of absentee voters. In addition, Petitioners are residents of only 18 of Minnesota's 87 counties. To the extent Petitioners do not have standing to raise the legal claims of voters whose absentee ballots were rejected by election officials in other counties, they could not serve as class representatives for voters in other counties.

Even if a Petitioner were willing and able to serve as a class representative, or if someone who is not currently a party could be proposed as a class representative, the potential for rivalry and conflict with members of a putative class comprised of voters for opposing candidates would weigh heavily against finding typicality. The interests of a class representative who is a supporter of one candidate are not aligned with the interests of voters who are supporters of opposing candidates, and any such class representative would have a potential disincentive to advance the claims of a putative class. The risk of conflict between the interests of a class representative and members of a putative class is particularly high in counties or areas where there is a large disparity in the number of votes cast for the candidates. For example, a class representative who voted for Coleman and is a resident of Hennepin County would have a

⁴ The election officials also are respondents and, therefore, could not represent a class of petitioners.

disincentive to vigorously represent the interests of Hennepin County voters, the large majority of whom voted for Franken.⁵

Therefore, Coleman fails to meet the typicality requirement for class certification.

4. Coleman has not established that the representative parties will fairly and adequately protect the interests of class.

The fourth criteria under Rule 23.01 requires the movant to show that the representative parties will fairly and adequately represent the interests of putative class members. Minn. R. Civ. P. 23.01(d). The adequacy requirement includes, but is broader than, the typicality requirement. 1 Conte & Newberg, *supra*, § 3.22, at 412. Due process requires that the adequacy requirement be strictly applied to ensure that the absent members of the class are well protected. *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 338 (4th Cir. 1998) (“due process requires that named plaintiffs possess undivided loyalties to absent class members”).

In determining whether representative parties will adequately protect the interests of the class, Minnesota courts should examine:

- (1) whether the representatives’ interests are sufficiently identical to those of absent class members so that the representatives will vigorously prosecute the suit on their behalf; (2) whether the attorneys are qualified, experienced, and capable of conducting the litigation; and (3) whether the representatives have any interests in conflict with the objective of the class they represent.

Streich v. Am. Family Mut Ins. Co., 399 N.W.2d 210, 215 (Minn. App. 1987); *see also Ario*, 367 N.W.2d at 513 (a putative class representative must be able to “fairly and adequately protect the interests of the class” in that the interests of the putative class representative “must coincide with the interests of other class members” to make class certification appropriate); *E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (a class representative must “possess

⁵ Moreover, there is no way to tell whether an actual conflict exists unless a proposed class representative is forced to disclose for which candidate he or she voted.

the same interest and suffer the same injury as the class members”) (internal quotation marks and citation omitted).

Not only has Coleman failed to identify a proposed class representative, he also has failed to identify proposed class counsel. *See* Coleman Brf. at 5. Therefore, Coleman fails to satisfy the adequacy of representation requirement.⁶

In any event, as discussed above, the un-typicality of potential class representatives’ claims and the potential for conflict with the interests of the putative class weigh heavily against finding adequacy of their potential representation. Similarly, the only counsel involved in this matter represent parties who have actual or potential conflicts with members of the putative class.

Because Coleman fails to satisfy his burden with respect to each of the four requirements of Rule 23.01, there is no need for the Court to consider whether Coleman satisfies the requirements of Rule 23.02. Nevertheless, if the Court were to delve further, it would find that Coleman also fails to satisfy his burden under Rule 23.02.

B. Coleman Fails To Satisfy Any Of The Requirements Of Rule 23.02.

Coleman quotes Rule 23.02, which identifies three types of permissible class actions, but does not specifically state which type or types of class actions he intends to maintain. *See* Coleman Brf. at 6. For this reason alone, Coleman fails to satisfy his burden.

In any event, certification is not appropriate under any recognized type of class action.

⁶ Coleman not only fails to identify proposed class counsel, he ignores the issues of how class counsel, whomever they might be, would be compensated and how the potentially enormous costs associated with litigating a class action on behalf of thousands of putative class members would be paid. These practical issues weigh against certifying a class.

1. Class certification under Rule 23.02(c) is not appropriate.

A class action may be maintained if, in addition to satisfying all four requirements under Rule 23.01, “the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”

Minn. R. Civ. P. 23.02(c). Matters pertinent to these findings include:

(1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action.”

Id.

The predominance requirement under Rule 23.02(c) is “far more demanding” than the commonality requirement under Rule 23.01. *Kochlin*, 2001 WL 856206 at *3 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622-24 (1997)). For common issues of law or fact to predominate, they must “constitute a significant part of the individual cases.” *Streich*, 399 N.W.2d at 217. In determining whether common issue predominate, courts should consider whether the generalized evidence will prove or disprove an element on a simultaneous class-wide basis that would not require examining each class member’s individual position. *See Good*, 248 F.R.D. at 573.

On election night, election judges made individual determinations, based on all the available evidence, whether to accept or reject each absentee ballot. To determine whether the election judges were right or wrong, this Court also would have to examine each and every one of the rejected ballot envelopes and all of the relevant absentee ballot applications, voter registration cards, and other evidence of eligibility and compliance with the statutory

requirements for absentee voting. In addition, this Court may need to hear and consider the testimony of the army of election officials who made the decisions. As this Court recognized in denying Contestants' summary judgment motion, there simply are no shortcuts.

The fact that the same undisputed legal standards for absentee voting apply to all absentee ballots is no salve. Individual determinations were made and, if the putative class is certified, must be made again as to whether each ballot met these standards. Under these circumstances, individual issues predominate over any common issues.

In addition, class action treatment is not superior to individual adjudication for the following reasons:

First, members of the putative class have expressed interest in individually controlling the prosecution of their claims. More than sixty have expressed such interest by filing this § 204B.44 petition. Unquestionably, many other members of the putative class are aware of their rights and affirmatively decided not to pursue the matter. Significantly, not a single member of the putative class has expressed any interest in being a class action representative or otherwise being part of a class action. Only Coleman, who is not a member of the putative class, has expressed interest in a class action. And given Coleman's well-documented previous efforts to prevent the review of rejected absentee ballots, it is clear that Coleman's interest is born of desperation to gain tactical advantage, not to advance the interests of putative class members.

Second, the scope of the existing election contest weighs against class certification. The election contest already encompasses the issue that is the primary focus of the putative class action: whether to re-re-review rejected absentee ballots. Certifying a class action would only further complicate matters.

Third, regardless of whether a class is certified, all issues relating to rejected absentee ballots will be concentrated in the same forum: this Court, working in conjunction with the Minnesota Supreme Court. Therefore, this factor does not weigh in favor of class certification.

Fourth, difficulties likely to be encountered in the management of a class action weigh heavily against class certification. As noted above, class action treatment likely would require many subclasses involving many new class representatives. It also likely would require joinder, as respondents, of the 69 counties that currently are not party to these proceedings. Discovery (including discovery regarding the adequacy of proposed class representatives) would expand exponentially. Further, the trial, already two-weeks-old, would be interrupted to allow class counsel to get up to speed, and it might be necessary to backtrack to offer additional evidence with respect to ballots and issues. In short, the entire process would be needlessly muddled.

Finally, Coleman's contention that, in the absence of class action treatment, putative class members' claims likely will go undecided because individual litigation would be prohibitively expensive makes no sense in this context. Coleman's argument, sometimes referred to as a "negative-value suit" argument, typically is made when potential individual damages are too small to warrant the expense of individual lawsuits and class action treatment is the only way to attract and pay counsel to represent plaintiffs. However, in this case, there are no damage claims and, hence, no potential for the creation of a common fund from which to pay attorneys. Coleman moves the Court only for an order requiring that the rejected absentee ballots be opened and counted. Motion at ¶ 3. Therefore, certifying a class would not resolve any issues that might exist with respect to attracting and paying counsel.

In sum, not only do individual issues predominate, a class action is not superior to other methods for fair and efficient adjudication of the controversy. Therefore, the proposed class cannot be certified under Rule 23.02(c).

Further, to the extent Coleman's motion can be interpreted to request for certification under Rule 23.02(a) and/or Rule 23.02(b), it is similarly unavailing.

2. Class certification under Rule 23.02(a) is not appropriate.

A class action may be maintained if, in addition to satisfying all four requirements under Rule 23.01, the prosecution of separate actions by or against individual members of the class would create risk of:

- (1) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
- (2) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests[.]

Minn. R. Civ. P. 23.02(a).

Prosecution of separate petitions by individual members of the putative class will not create a risk of inconsistent adjudications which would establish incompatible standards for election officials. Unlike actions involving most other matters, all election contests and petitions asserting that an individual's absentee ballot was improperly rejected will be presented at the same time to the same fact-finder and decision maker. Therefore, however this Court rules, it will establish consistent standards, if any, to guide election officials.

Further, adjudications with respect to individual members of the putative class will not be dispositive of the interests of non-parties and will not impede their abilities to protect their

interests. Resolution of individual claims will determine only whether each individual's absentee ballot is opened and counted and will not determine whether the fate of any other ballot.

3. Class certification under Rule 23.02(b) is not appropriate.

A class action may be maintained if, in addition to satisfying all four requirements under Rule 23.01, "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Minn. R. Civ. P. 23.02(b).

Certification under Rule 23.02(b) is inapplicable because election officials determined whether to accept or reject each absentee ballot one-by-one, considering evidence unique to each ballot. Therefore, election officials did not act or refuse to act on grounds generally applicable to the class.

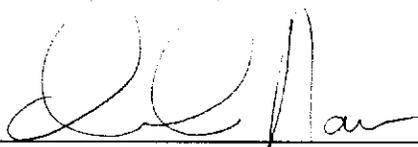
CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Court deny Intervenor Coleman's motion for class certification.

Date: February 9, 2009

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

By: _____


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