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STATE OF MINNESOTA  
COUNTY OF RAMSEY

**FILED**  
Court Administrator

FEB 11 2009

By            Deputy

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 from the State of Minnesota,

No. 62-CV-09-56

Cullen Sheehan and Norm Coleman,

Contestants,

**CONTESTEE'S REPLY MEMORANDUM  
IN SUPPORT OF HIS MOTION IN LIMINE  
TO EXCLUDE TESTIMONY OF KING BANAIAN**

v.

Al Franken,

Contestee.

**I. INTRODUCTION**

Contestee Al Franken respectfully submits that the Motion in Limine to Exclude Testimony of King Banaian ("Motion in Limine") should be granted. As his deposition transcript makes plain, Professor Banaian's proposed testimony is irrelevant to the only proper question before the Court: which candidate received the greatest number of votes that were "legally cast" in the 2008 U.S. Senate election. Evidence of alleged statistical differences in rejection rates between Minnesota counties is especially irrelevant in light of Professor Banaian's own admitted inability to offer any evidence, testimony or opinion on the underlying cause for the observed differences between the counties. As a result, this evidence is irrelevant under Minn. R. Evid 402 and 702. It would add nothing to this already over-burdened litigation except additional cost, delay, and confusion, and should also be excluded under Rule 403.

## II. ARGUMENT

As noted in Contestee's Motion in Limine, Contestants' propose to offer testimony that "there are many, in some cases 21 counties of the 87 that at the 95 percent confidence level appear to have rejected more ballots, absentee ballots than one would expect based on the statewide rate." Banaian Dep. at 27, lines 3-7.<sup>1</sup> Professor Banaian candidly admitted that he has not examined, or been asked to examine, the underlying causes for the observed difference, Dep. at 12 – 13, 50-51. Indeed, the professor admitted that there are a "variety of potential sources of variation" but that he could not, short of speculation, attribute the differences to population variations, socioeconomic differences, variations in the number of first-time absentee ballot voters, or any number of other causal explanations. Dep. at 65-67. Yet without precisely that sort of analysis, the proposed expert testimony is completely irrelevant as it does not bear on whether specific ballots were or were not properly rejected and who received the highest number of votes in the 2008 general election – the only issue properly before this Court.<sup>2</sup>

Contestants' Memorandum on Law In Opposition to Motion in Limine to Exclude Testimony of Professor King Banaian ("Contestants' Opp.") argues this evidence is relevant because the "statistical significance of the variation in rejection rates is not obvious on the face of the data," Contestants' Opp., at 2, and the proposed testimony would illuminate the significance of these differences. The argument fails at several levels.

For starters, the task before the Court is to determine which of the two candidates received the highest number of votes legally cast in this election. The relative rejection rates between counties sheds no light on this subject. A rejected absentee ballot either was, or was

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<sup>1</sup> Professor Banaian's deposition transcript is attached to Contestee's Motion in Limine.

<sup>2</sup> Indeed, the testimony would likely be irrelevant even *with* explanatory opinion testimony since, with or without an explanation, the only question before this Court is which candidate received the highest number of legally cast votes.

not, properly rejected and the fact that it was or was not rejected by a county with a higher or lower rate of rejection than its neighboring county (or even as compared to all of the other counties) hardly makes that rejection any more or less wrongful or the vote more or less "legally cast." Rejection rates by county are, in short, simply irrelevant to the task before this Court.

Moreover, the use of relatively unsophisticated binomial distribution analysis and chi-square tests are hardly the preferred means of statistical proof in discrimination cases. Instead, such rudimentary statistical tests are frequently rejected<sup>3</sup> in favor of a regression analysis that can eliminate other causal explanations for observed differences<sup>4</sup> – precisely the analysis that Professor Banaian admits that he *cannot offer*.

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<sup>3</sup> See, e.g., *McReynolds v. Sodexho Marriott Serv. Inc.*, 349 F. Supp. 2d 1, 22 (D.D.C. 2004) (noting that analyses that exclude major factors may be "so incomplete as to be inadmissible as irrelevant." (quoting *Coward v. ADT Sec. Sys.*, 140 F.3d 271, 274 (D.C. Cir. 1998)) (excluding statistical analysis that "failed to account for job title or any other variable representing type of work performed" where plaintiffs claimed "that they should be compared to employees in other job categories who perform similar work but who earn more than they"); *King v. Gen. Elec. Co.*, 960 F.2d 617, 627 (7th Cir. 1992) (stating that "the statistical analysis [must] properly control[] for factors that might lead to differences in raw percentages," finding that plaintiffs' chi square analysis was insufficient and noting that "[m]ultiple regression analyses, designed to determine the effect of several independent variables on a dependent variable, which in this case is hiring, are an accepted and common method of proving disparate treatment claims" (quoting *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 324 (7th Cir. 1988)); *Smith v. Salt River Project Agr. Imp. and Power Dist.*, 109 F.3d 586, 590 (9th Cir. 1997) (affirming district court finding that defendant's multiple regression analysis rebutted plaintiffs' "simplistic and misleading" chi square method that failed to consider the effect of non-racial factors on home ownership); *Griffin v. Board of Regents of Regency Universities*, 795 F.2d 1281, 1289-90 (7th Cir. 1986) ("The district court did not err in its preference for statistics that control for the possession of a doctorate and for the effects of pre-1972 decisions.").

<sup>4</sup> *Ottaviani v. State Univ. of New York at New Paltz*, 875 F.2d 365, 367 (2d Cir. 1989) ("In disparate treatment cases involving claims of [race] discrimination, plaintiffs typically use multiple regression analysis to isolate the influence of [race] on employment decisions relating to a particular job or job benefit"; *Segar v. Smith*, 738 F.2d 1249, 1261 (D.C. Cir. 1984) ("Multiple regression is a form of statistical analysis used increasingly in Title VII actions that measures the discrete influence independent variables have on a dependent variable such as salary levels."); *Sears, Roebuck*, 839 F.2d at 325 ("Multiple regression analyses, designed to determine the effect of several independent variables on a dependent variable, which in this case is hiring, are an accepted and common method of proving disparate treatment claims") (citing *Bazemore v. Friday*, 478 U.S. 385, 106 S. Ct. 3000, 3008-09 (1986); Campbell, *Regression Analysis in Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet*, 36 Stan. L. Rev. 1299 (1984)).

Finally, the proposed testimony will be time-consuming, expensive and distracting to this Court in a lawsuit that has already consumed weeks of tedious testimony on only a small number of the thousands of ballots at issue. If accepted by the Court, the proposed expert testimony will likely require Contestee to call an *opposing expert* to testify, first in a deposition, then in Court. The cost, delay, and distraction that such a detour into a battle of experts would entail far outweighs whatever minimal probative value that such testimony might offer and should be excluded for that reason as well. Minn. R. Evid. 403.

Accordingly, Contestee Al Franken respectfully requests that the Court grant Contestee's Motion in Limine To Exclude Testimony of King Banaian.

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Contestee acknowledge that sanctions may be imposed under Minn. Stat. §549.211.

