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Court Administrator

STATE OF MINNESOTA	FEB 3 2009	DISTRICT COURT
COUNTY OF RAMSEY	By <i>[Signature]</i> Deputy	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,

Cullen Sheehan and Norm Coleman,

Contestants,

vs.

Al Franken,

Contestee.

**ORDER ON CONTESTEE'S  
MOTION IN LIMINE TO  
LIMIT ABSENTEE-BALLOT  
EVIDENCE TO BALLOTS  
PLEADED IN THE NOTICE  
OF CONTEST**

Ct. File No. 62-CV-09-56

The above-entitled matter came before the Court upon a Motion in Limine by Contestee Al Franken to Limit Absentee-Ballot Evidence to Ballots Pledged in the Notice of Contest. The Court having read the arguments of counsel, and based upon the files, records, and proceedings herein, makes the following:

**ORDER**

1. Contestee Al Franken's Motion in Limine to Limit Absentee-Ballot Evidence to Ballots Pledged in the Notice of Contest is GRANTED IN PART and DENIED IN PART as follows:

- a. The scope of this trial shall be limited to the following:
  - i. Absentee ballots where it is claimed that the voter complied with the requirements of Minnesota Statutes § 203B.12, subd. 2.
  - ii. Absentee ballots where it is claimed that the voter's non-compliance with Minnesota Statutes § 203B.12, subd. 2 was not due to fault on behalf of the voter.
- b. Contestants estimate the total number of these ballots to be 4,797.
- c. Contestants are limited to presenting evidence on only those ballots that were specifically disclosed to Contestee on or before January 23, 2009.

2. Any other relief not specifically provided herein is DENIED.

3. The attached memorandum is incorporated herein by reference.

*Elizabeth A. Hayden*

Elizabeth A. Hayden  
Judge of District Court

BY THE COURT:

*Kurt J. Marben*

Kurt J. Marben  
Judge of District Court

*Denise D. Reilly*

Denise D. Reilly  
Judge of District Court

Dated: 2/3/09

## MEMORANDUM

### I. Factual Background

Contestants Cullen Sheehan and Norm Coleman ("Contestants" or "Coleman") filed a Notice of Contest with the Ramsey County District Court on Tuesday, January 6, 2009 contesting the general election of November 4, 2008 pursuant to Minnesota Statute 209.021. Contestants seek in part an order directing the recounting and retallying of all ballots cast during the general election. On January 23, 2009, the Court heard oral argument on motions for summary judgment filed by both parties. Both parties filed memorandums of law and exhibits in accordance with these motions. The trial of this matter began on January 26, 2009. This matter is now before the Court upon Contestee Al Franken's ("Contestee" or "Franken") Motion to Limit Absentee-Ballot Evidence to Ballots Pleaded in the Notice of Contest.

### II. Contestee's Motion is Granted In Part, Denied In Part

When determining an election contest, the Court shall proceed in the matter provided for the trial of civil actions "so far as practicable." Minn. Stat. § 209.065. Minnesota is a notice pleading state. *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997). Under notice pleading, one function of a complaint is "to give fair notice to the adverse party of the incident giving rise to the suit," *Kelly v. Ellefson*, 712 N.W.2d 759, 768 (Minn. 2006), and must be framed "so as to give fair notice of the claim asserted." *Roberge v. Cambridge Co-op. Creamery Co.*, 67 N.W.2d 400, 203 (Minn. 1954). Further, a notice of contest must specify the grounds on which the contest will be made. Minn. Stat. § 209.021, subd. 1.

Contestee must be sufficiently apprised of the grounds of the contest so that he is given a fair opportunity to meet the asserted claims. *See Christenson v. Allen*, 119 N.W.2d 35, 39 (Minn. 1963). The expedited nature of these proceedings, (*see* Minn. Stat. § 209.021,

requiring notice of contest to be filed within seven days after the canvass is completed; and Minn. Stat. § 209.065, requiring trial to begin within 20 days after the filing of the notice of contest) makes it impractical to require Contestants to disclose the individual names of all voters whose ballots they believed were wrongly rejected when the Notice of Contest was filed.

Contestee argues that Contestant should be limited to presenting evidence on 650 ballots pled in paragraph 10 of the Notice of Contest. However, claims in addition to the 650 ballots specifically named in the Notice of Contest were pled. Paragraph 11 of the Notice of Contest alleges that "a material and significant number of absentee ballot envelopes (including without limitation envelopes identified by representatives of the Coleman for Senate campaign) were improperly rejected by local election officials and were not counted on Election Day *or* during the Recount." By way of example, Contestants attached exhibits (Exhibit B-1) containing ballots that were marked "accepted" but were in fact rejected, ballots not marked "accepted" or "rejected" but which should have been accepted, ballots with obvious election judge error on the face of the ballot, and ballots which were delivered to the wrong precinct. The Court finds that the Notice of Contest and the attached exhibits contained in B-1 put Contestee on notice of contest grounds in addition to 650 ballots. The Court believes the categories of ballots contained in this Order were pled in the Notice of Contest.

Although the Notice of Contest could have been pled more clearly so as to eliminate confusion on whether the 650 ballots were the sole claim, ballots in addition to the 650 have been the subject of a motion to strike and motions for summary judgment. The Contestee has been put on notice through those proceedings that the Notice of Contest contained claims in addition to the 650 ballots. But, in order for Contestee to be given a fair opportunity to meet the asserted claims, Contestants are limited to the individual voters whose ballots they believed were

wrongly rejected prior to the commencement of trial. Contestants, therefore, are limited to presenting evidence on only those ballots that were specifically disclosed to Contestee by name as of January 23, 2009.