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STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

In the Matter of the Contest of General Election ^{CNC} ~~By~~ Deputy
held on November 4, 2008, for the purpose of
electing a United States Senator for the State of
Minnesota

Cullen Sheehan and Norm Coleman,

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

Contestants,

vs.

Al Franken,

Contestees,

Dennis Peterson, et. al.,

Petitioners,

Supreme Court File No. A09-65

vs.

**ORDER DENYING MOTION FOR
CERTIFICATION OF A CLASS**

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

Respondents.

This matter comes before the Court on Intervenor Norm Coleman's motion for certification of a class. The Court heard argument on this motion on February 12, 2009. The Court having heard and read the arguments of counsel, and based upon the files, records, and proceedings herein makes the following:

ORDER

1. Intervenor Coleman's motion for certification of a class is DENIED.
2. Any other relief not specifically ordered herein is DENIED.
3. The attached Memorandum is incorporated as if fully set forth herein.

Dated: February 23, 2009

Elizabeth A. Hayden
Elizabeth A. Hayden
Judge, District Court

Kurt J. Marben
Kurt J. Marben
Judge, District Court

Denise D. Reilly
Denise D. Reilly
Judge, District Court

MEMORANDUM**I. Introduction**

On January 13, 2009, certain individual Petitioners filed a petition pursuant to Minnesota Statute § 204B.44 with the Minnesota Supreme Court arguing that their ballots had not been counted in the 2008 general election due to official errors and omissions. Norm Coleman (“Coleman”) moved to intervene in the Petitioners’ proceeding before the Supreme Court. On January 16, 2009, the Supreme Court issued an order granting Coleman’s motion for intervention and directing the Petition to this Court for consideration and decision within the current election contest. In that Order, the Supreme Court observed that, “[j]udicial efficiency and the interests of justice will better be served if the claims presented in this matter are addressed by the three-judge district court panel in the election contest proceeding in Ramsey County District Court.” (Order, January 16, 2009 at 1-2.)

On January 23, 2009, Coleman moved this Court for certification of a class pursuant to Minnesota Rule of Civil Procedure 23. Coleman seeks “certification of a class of thousands of voters who submitted absentee ballots in the November 4, 2008, general election” (Intervenor’s Mem. at 1). Petitioners filed an objection to this motion on February 9, 2009. The Court held a hearing on this motion on February 12, 2009. At the hearing, Contestee Al Franken (“Contestee”) moved the Court for limited intervention in Petitioners’ § 204B.44 proceeding for purposes of objecting to the motion for class certification. Contestee joined in Petitioners’ opposition to Coleman’s motion.

II. Certification of a Class is Not Proper in a Proceeding Under Minnesota Statute § 204B.44

While Minnesota Rule of Civil Procedure 23 allows for certification of a class in civil actions proceeding in District Court, the Court questions the applicability of the class-action procedure in proceedings under § 204B.44. That statute states that, “any individual may file a petition in the manner provided in this section” (emphasis added). The plain language of Minnesota Statute § 204B.44 contemplates a remedy for any individual, not a class of individuals.

Furthermore, the statute vests the Supreme Court with original jurisdiction to hear claims involving elections for federal office. Minn. Stat. § 204B.44; *see also Studer v. Kiffmeyer*, 712 N.W.2d 552, 559 (Minn. 2006) (Anderson, G. Barry, concurring) (recognizing the original jurisdiction of the Supreme Court to hear petitions under § 204B.44). However, the Rules of Civil Procedure, including Rule 23, only govern the procedures in the district courts of Minnesota. Minn. R. Civ. Proc. 1. In contrast, proceedings in the Supreme Court, even those involving an exercise of the Court’s original jurisdiction are governed by the Minnesota Rules of Civil Appellate Procedure. Minn. R. Civ. App. Proc. 101.01 (“These rules govern procedure in the Supreme Court . . . on applications for writs or other relief in civil proceedings which the Supreme Court, the Court of Appeals or a justice or judge thereof is competent to give.”). The Rules of Civil Appellate Procedure have no mechanism for class certification. Had the Supreme Court chosen to keep the Petition, Coleman would not be able to seek class certification under Rule 23, nor can he seek such certification before this Court.

Coleman’s motion for class-certification is denied as improper in a § 204B.44 proceeding.

III. The Requirements of Minnesota Rule Civil Procedure 23.01 Are Not Satisfied

Even assuming that class-certification is within the scope of a proceeding under § 204B.44, the Court denies Coleman's motion as failing to satisfy all necessary requirements.

"[A] Minnesota Court may not certify a class unless the class satisfies the requirements of Minnesota Rule of Civil Procedure 23." *Lewy 1990 Trust v. Investment Advisors, Inc.*, 650 N.W.2d 445, 451 (Minn. Ct. App. 2002). Class certification under Rule 23 is a two-step process. *Id.* First, the class must satisfy all four mandatory requirements of Rule 23.01: numerosity, commonality, typicality, and adequacy of representation. *Id.* If the proposed class satisfies these requirements, then class certification may nevertheless be denied if the Court determines that it does not satisfy the requirements of Rule 23.02.

Minnesota Rule of Civil Procedure 23.01 specifically provides that,

"One or more members of a class may sue or be sued as representative parties on behalf of all only if

- (a) the class is so numerous that joinder of all members is impracticable;
- (b) there are questions of law or fact common to the class;
- (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (d) the representative parties will fairly and adequately protect the interests of the class.

The burden of showing the propriety of certification is on the party seeking certification.

Peterson v. BASF Corp., 618 N.W.2d 821, 826 (Minn. Ct. App. 2000). Trial courts have considerable discretionary power to determine whether class actions may be maintained. *Streich v. American Family Mut. Ins.*, 399 N.W.2d 210, 213 (Minn. Ct. App. 1987). The Court will examine each of the four prerequisites in turn.

A. Numerosity is Satisfied.

Rule 23.01(a) requires that the class be so numerous that joinder of all members is impracticable. *Lewy 1990 Trust*, 650 N.W.2d at 452. Courts have not developed “arbitrary or rigid rules” to define the required size of a class, and impracticability is a fact-specific determination. *Id.* In this case the class of absentee voters that Coleman seeks to have certified is in the thousands. The numerosity requirement is met.

B. Commonality is Not Satisfied

Rule 23.01(b) permits certification of a class only if there are “questions of law or fact common to the class.” *Lewy 1990 Trust*, 659 N.W.2d at 453. The course of the proceedings in Petitioners’ § 204B.44 action shows that while there may be common questions of law amongst voters seeking relief under the statute, questions of fact are unique to each Petitioner. (*See e.g.*, Order on Petitioners’ Motion for Summary Judgment (individually analyzing each Petitioner’s claim and proffered evidence)). Under Rule 23.02, common questions must predominate in order for certification to be proper. Minn. R. Civ. P. 23.02. Here, the evidence shows that common questions of fact do not predominate and, thus, class certification would be improper. *In re Objections & Defenses to Real Prop. Taxes for 1980 Assessment*, 335 N.W.2d 717, 719 (Minn. 1983).

C. Typicality is Not Satisfied

For class-certification to be proper, the claims and defenses of the representative parties must be “typical of the claims or defenses of the class.” Minn. R. Civ. P. 23.01(c). Typicality requires that the representative parties “have an interest compatible with that of the class sought to be represented.” *Ario v. Metro. Airports Comm’n*, 367 N.W.2d 509, 513 (Minn. 1985). A potential for rivalry or a conflict that may jeopardize the interests of the class weighs against a

finding of typicality. *Id.* While Coleman claims that this prong is met and requests that the Court appoint proper class representatives and class counsel under Rule 23, the Court declines such an invitation. Coleman cannot represent the class of rejected absentee voters that he seeks to have certified because he is not a member of that class. Furthermore, the Court notes that no individual voter or counsel has volunteered to serve as representative for the proposed class. It is not for the Court to thrust such a position upon parties and counsel that do not seek it. The proposed class fails for lack of typicality.

D. Adequacy of Representation is Not Satisfied

Rule 23.01(d) requires that “the representative parties will fairly and adequately protect the interests of the class.” Representational adequacy requires that the representative parties’ interests must coincide with the interests of other class members and that the parties and their counsel will competently and vigorously prosecute the lawsuit. *Ario*, 367 N.W.2d at 513.

Factors used to determine if the class representative and class counsel are adequate include: (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 that conflict with the objective of the class they represent.

Streich, 399 N.W.2d at 215. Given that Coleman has failed to propose a class representative or class counsel, there is no adequacy of representation in the proposed class.

Under Rule 23 each of the four prerequisites of 23.01 must be established before a class may be certified. The Court finds that Coleman has failed to carry his burden of establishing that typicality, commonality or adequacy of representation exist in the potential class of voters. Coleman’s motion for class certification is denied.