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FILED
Court Administrator

FEB 26 2009

By  Deputy

February 26, 2009

VIA HAND

The Honorable Elizabeth A. Hayden
Room 135, Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155-1500

The Honorable Denise D. Reilly
Room 135, Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155-1500

The Honorable Kurt J. Marben
Room 135, Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155-1500

Re: 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 v. Al Franken
Second Judicial District Case No. 62-CV-09-56

Dear Judges Hayden, Marben and Reilly:

We write pursuant to Gen. Rules of Practice 115.11 to request permission to file a motion asking the Court to reconsider its ruling yesterday striking the testimony of Pam Howell. The lack of bad faith or misconduct, the innocuous nature of the notes she had, the lack of real prejudice to Contestee, and the critical importance of her testimony to Contestants' case, together constitute compelling circumstances for the Court to reconsider its decision.

The record does not reflect any evidence of bad faith or misconduct on the part of counsel. Indeed, there was no effort to hide anything and no bad faith whatsoever. The failure to produce the notes Ms. Howell provided to Mr. Haapoja was inadvertent. Neither party produced any documents at all to the other before trial. Discovery focused on responses to interrogatories; the document request which purportedly required the production of this document was an extremely broad catch-all. If the Court has any doubt about counsel's good faith, it should give us the opportunity to present evidence to satisfy any concerns.

Moreover, the notes themselves are neither damaging nor inconsistent in any respect with Ms. Howell's testimony or with Contestants' disclosed theory of the case on this claim. The notes are simply Ms. Howell's effort to make notes to preserve her memory of the incident about which she testified.

The Honorable Elizabeth A. Hayden
The Honorable Denise D. Reilly
The Honorable Kurt J. Marben
February 26, 2009
Page Two

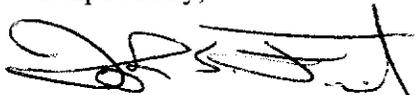
Not having the notes did not preclude Mr. Lillehaug from vigorously cross-examining Ms. Howell or otherwise unfairly prejudice Contestee. In any event, to the extent Mr. Lillehaug requires more time to review the notes and an additional opportunity to question Ms. Howell, there is no reason why she cannot be called to appear again at trial.

Ms. Howell's testimony is relevant evidence that is critical to Contestants' claim regarding the double-counting of ballots in several precincts. As the Court heard, Ms. Howell testified that duplicate ballots were made and not marked as such. That fact indicates that counting the originals resulted in double-counting. The issue is a material one: all told, in the various precincts where this inadvertent mistake appears to have occurred, double-counting contributed approximately 100 additional votes to Contestee.

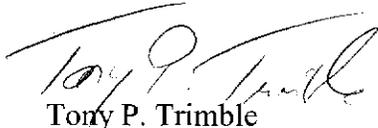
In the circumstances, Contestants respectfully believe the sanction of excluding Ms. Howell's testimony is unwarranted and unprecedented. We are unaware of any circumstance in which a court has imposed such an extreme sanction in the absence of compelling evidence of misconduct or bad faith. *See, e.g., Quinn v. Consol. Freightways Corp. of Delaware*, 283 F.3d 572 (3d Cir.2002) ("the exclusion of critical evidence is an 'extreme' sanction, not normally to be imposed absent a showing of willful deception or 'flagrant disregard' of a court order by the proponent of the evidence"(citation omitted)).

For these reasons, we respectfully request that the Court grant Contestants the opportunity to file a motion to reconsider its ruling on this critical issue.

Respectfully,



Joseph S. Friedberg



Tony P. Trimble



James K. Langdon

cc: David L. Lillehaug, Esq.
Kevin J. Hamilton, Esq.

AFFIDAVIT OF SERVICE – PERSONAL AND VIA EMAIL

STATE OF MINNESOTA)
)ss.
COUNTY OF HENNEPIN)

James K. Langdon, being first duly sworn on oath, deposes and states that on the 26th day of February, 2009, he served the attached:

February 26, 2009 letter to Judges Hayden, Marben and Reilly requesting permission to file a motion asking the Court to reconsider its February 25, 2009 ruling striking the testimony of Pam Howell

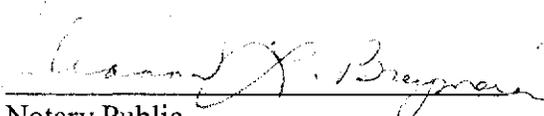
by handing to and leaving with each of the following a true and correct copy thereof at the Minnesota Judicial Center, 25 Rev. Dr. Martin Luther King Jr. Blvd., St. Paul, MN 55155-1500, in the County of Ramsey, State of Minnesota:

The Honorable Elizabeth A. Hayden
The Honorable Kurt J. Marben
The Honorable Denise D. Reilly

David L. Lillehaug, Esq.
Kevin J. Hamilton, Esq.
ATTORNEYS FOR CONTESTEE

Subscribed and sworn to before me this
26th day of February , 2009




Notary Public

