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Court Administrator

STATE OF MINNESOTA
COUNTY OF RAMSEY

FEB 27 2009
By [Signature] 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,

v.

**CONTESTEE'S REPLY IN SUPPORT OF
HIS MOTION IN LIMINE TO EXCLUDE
COUNTY DATA PRACTICES ACT
"CERTIFICATIONS"**

Al Franken,

Contestee.

I. INTRODUCTION

The Court has now heard oral argument from both parties on the pending motion in limine to exclude evidence relating to certain emailed "certifications" sought by Contestants. During the course of that argument, Contestants presented no new arguments or theories of admissibility that would save the "certifications" at issue. Contestee respectfully submits that, on the record before the Court, the Court should grant the motion for the reasons set forth in the opening brief and at oral argument. As invited by the Court, Contestee Al Franken with this memorandum responds to the authorities relied on by Contestant during oral argument.

II. ARGUMENT AND AUTHORITY

At oral argument, Contestants expressly abandoned any reliance on Rule 803(6), the business records exception. They "primarily" rely upon Rule 803(8), and counsel also mentioned,

as suggested by the Court, Rule 803(10).¹ Neither of these rules provide a vehicle for the admission of the "certifications" in question, even assuming that Rule 902's self-authentication provisions applied.²

A. Rule 803(8)

Rule 803(8) applies to documents " setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, . . . or (C) in civil actions . . . , factual findings resulting from an investigation made pursuant to authority granted by law." Contestants argued at oral argument that the "certifications" they seek are analogous to government reports of investigations of airplane crashes or public health concerns and hence are admissible under this Rule. But the "certifications" here are very different from the reports at issue in the cases cited by Contestants for at least two reasons.

First, in those cases, government officials had a preexisting duty imposed by law to investigate airplane crashes on one hand, and widespread instances of toxic shock syndrome on the other, and prepare detailed official government reports outlining the events and their causes.

See Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 157, 109 S. Ct. 439, 102 L. Ed. 2d 445 (1988)

¹ Counsel also mentioned the residual exception, which is now Rule 807 rather than Rule 803(24) as stated by counsel. Counsel made no specific argument under this exception and cited no authority to support the suggestion that it should be applied here. Allowing these "certifications" to be admitted over a hearsay objection would be an improper end-run around the codified exceptions to the hearsay rules to admit the "certifications," which do not have sufficient indicia of reliability to be admitted under Rule 807. By its own text, Rule 807 allows only statements "having equivalent circumstantial guarantees of trustworthiness," but that of course is precisely the problem with these certifications – casual emailed responses, not prepared in the ordinary course of governmental business, carry none of the circumstantial guarantees provided by either business records or official government records. Finally, and perhaps most significantly, the rule "may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing, to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name, address and present whereabouts of the declarant." Rule 807.

² At oral argument, Contestants cited *Minneapolis Public Housing Authority v. Greene*, 463 N.W.2d 558, 561 (Minn. Ct. App. 1990), which concerned the authenticity of a forensic scientist's lab report under Minnesota Rule of Evidence 901. Whether considered under Rule 901 or the self-authentication provisions of Rule 902, the "certifications" do not provide a means of showing that the *data* relied upon to make the certifications is what it purports to be. But even if it did, this case provides no basis upon which to admit such a certification over a hearsay objection.

(JAG report of military plane crash); *Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 613, 617 (8th Cir. 1983) (CDC and state health department reports regarding statistical relationship between tampon use and the incidence of toxic shock syndrome). The theory of Rule 803(8)(C) is that when a government official acts according to her legally imposed duty, the results are likely trustworthy. *Kehm*, 724 F.2d at 618 ("The public records and reports exception rests on 'the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record.'") (quoting Fed. R. Evid. 803(8) adv. comm. note). Neither result is surprising in those cases but neither is even remotely analogous to the present circumstances.

Here, the county officials had no preexisting legal duty to investigate the matters addressed in Contestants' requests, and no duty at all to respond to the requests as—for the reasons stated in Contestee's opening brief—the requests are improper under the Data Practices Act. These requests, functionally, are standard litigation interrogatories addressed to third parties who are neither answering under oath nor testifying in such a manner as to allow fair opportunity to examine the foundation for such testimony.

Second, and importantly, the reports discussed in the cases cited by counsel are prepared for safety purposes, *not* for litigation. Admission under Rule 803(8) requires the Court to determine that the record in question is trustworthy. The Advisory Committee Note to the federal Rule 803(8) sets forth four factors to consider in making the trustworthiness determination, one of which is whether the document was prepared for litigation. *Beech Aircraft*, 488 U.S. at 168 n.11 ("The Advisory Committee proposed a nonexclusive list of four factors it thought would be helpful in passing on this question: (1) the timeliness of the investigation; (2) the investigator's skill or experience; (3) whether a hearing was held; and (4) possible bias when reports are prepared with a view to possible litigation . . .").

In making these points regarding trustworthiness, Contestee of course in no way intends to impugn the integrity or competence of the county officials who have attempted to respond to Contestants' requests. Contestee has no doubt that these officials have acted in good faith and have done their best to provide accurate information. So have those election officials who have testified in open Court but as the record has vividly demonstrated, when confronted with the records, carefully examined on their meaning, or given the opportunity to reflect during cross examination, the initial testimony – under oath, in good faith, and with the best of intentions – often turns out to be not quite what it first appeared and not infrequently precisely the *opposite* of what it first appeared. Again, that's not surprising; indeed, it is the entire purpose of the truth finding function of our legal system. That open and transparent process is crucial to any trial (which is of course the reason for the hearsay rule in the first place), but especially in an election contest before the people of the State of Minnesota in a hotly contested U.S. Senate election.³

Contestant also cited Minnesota Statute § 600.13. That statute merely concerns the authenticity of copies of public records, which is not the issue here.

B. Rule 803(10)

At oral argument, the Court raised Rule 803(10), which allows an official to certify the absence of a public record. This Rule could apply if, for example, Contestant asked officials to look for an absentee ballot request from a specific individual and certify that they found none but only when "in the form of a certification in accordance with Rule 902, or testimony, that diligent search

³ Contestants also cite *Sabes v. City of Minneapolis*, 265 Minn. 166, 120 N.W.2d 871, 877 (1963), for the unremarkable proposition that one reason for the public records exception is to avoid pulling government officials away from their official duties to testify in court. This benefit, however, does not overcome core concerns of reliability, trustworthiness, and ensuring that a need for cross-examination is met. Rather, it is a benefit that is obtained through the rules *when these concerns are alleviated because the rules' admissibility requirements are met*. See *id.* at 867-77 ("Wigmore goes on to say that the disadvantages of failing to administer the oath or to subject the witness to cross-examination are offset by the probable trustworthiness of a report which is likely to be accurate if made in the regular course of the official's duties."). As explained above, the "certifications" here do not meet the requirements of the rules.

failed to disclose the record, report, statement, or data compilation or entry." Contestants' emailed requests do not even purport to comply with Rule 902, much less require that the responding counties and cities conduct a "diligent search" and certify the absence of an entry – no doubt because nothing in the Data Practices Act requires that the counties conduct such a search at public expense and provide such a certification to one party to an election contest. Absent compliance with the terms of Rule 803(10), these emailed responses are hearsay and should be excluded.

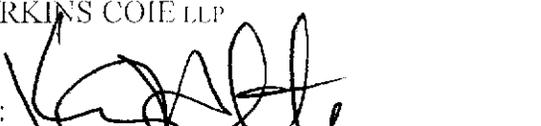
III. CONCLUSION

For these reasons, Contestee respectfully submits that the requested "certifications" be excluded in favor of actual testimony of persons with knowledge, copies of the original source materials, and other relevant evidence, all subject to cross examination on the public record before this Court, on the record, and before the public.

Dated: February 25, 2009

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