

**FILED**  
**Court Administrator**

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STATE OF MINNESOTA	MAR 11 2009	DISTRICT COURT
COUNTY OF RAMSEY	By <u>[Signature]</u> 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,

**ORDER GRANTING IN PART AND DENYING IN PART PETITIONERS' RENEWED MOTION FOR SUMMARY JUDGMENT**

Cullen Sheehan and Norm Coleman,

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

Contestants,

vs.

Al Franken,

Contestee.

The above-entitled matter came on for hearing before the Court on February 27, 2009, upon Petitioners' Renewed Motion for Summary Judgment. Counsel noted their appearances on the record. The Court having heard and read the arguments of counsel, and based upon the files, records, and proceedings herein, makes the following:

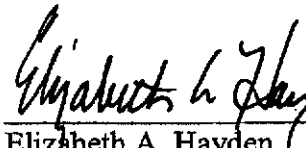
**ORDER**

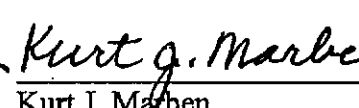
1. Petitioners' Renewed Motion for Summary Judgment is GRANTED IN PART AND DENIED IN PART.
2. The following absentee ballots shall be provided to the Secretary of State at a date to be determined by the Court to be opened and counted at a date to be determined by the Court, and the total be declared and certified for such use as might be appropriate by the United States Senate, this Court, or any other proper use under law.


Name	County
Brenda Rengo	Carlton County
Shirley VanDyck	Cass County
Arvid Blackbird	Dakota County
Laurence Engebretson	Dakota County
Caitlin Heinz	Dakota County
Donald Applebee	Hennepin County
Donelda Applebee	Hennepin County
Todd Toner	Hennepin County
Eila Nelson	Lake County
Judith Conlow	Pine County
Emma Bruggeman	Ramsey County
Josephine Garcia	Ramsey County
Sophia Hall	Ramsey County
Lora West	Stearns County

3. Any other relief not specifically ordered herein is DENIED.
4. The attached Memorandum is incorporated herein by reference.

BY THE COURT:

  
 Elizabeth A. Hayden  
 Judge of District Court

  
 Kurt J. Marben  
 Judge of District Court

  
 Denise D. Reilly  
 Judge of District Court

Dated this 11<sup>th</sup> day of March, 2009.

## MEMORANDUM

### I. Procedural Posture and Legal Standard

Contestants Cullen Sheehan and Norm Coleman ("Contestants") filed a Notice of Contest with the Ramsey County District Court on January 6, 2009 contesting the general election of November 4, 2008 pursuant to Minnesota Statute § 209.021.

On January 21, 2009, 61 individual voters ("Petitioners") filed a motion for summary judgment seeking an order from the Court directing that Petitioners' absentee ballots be opened and counted, and the total of such votes declared and certified for use in this election contest or any other proper use under law. Petitioners filed an amended notice of motion and motion for summary judgment on January 22, 2009, and a second amended notice of motion and motion for summary judgment on January 29, 2009. The Court heard oral argument on Petitioners' motion on January 30, 2009.

On February 10, 2009, the Court granted in part and denied in part Petitioners' motion for summary judgment. The Court determined Petitioners were entitled to summary judgment with respect to 24 voters who provided sufficient individualized evidence in support of their claims. The Court determined 37 individual voters had not presented sufficient evidence for the Court to determine as a matter of law that their ballots had been legally cast and should be opened and counted, and accordingly denied Petitioners' motion for summary judgment with respect to these individuals. The Court granted Petitioners leave to provide additional information demonstrating on an individual basis that the absentee ballots should be opened and counted as a matter of law.

On February 20, 2009, Petitioners filed a notice of motion and renewed motion for summary judgment, seeking an order from the Court directing that 19 Petitioners' absentee ballots be opened and counted and the total declared and certified for use in this election contest or any other proper use under law. Contestants filed a memorandum in opposition to Petitioners' renewed motion on February 26, 2009. The Court heard oral argument on Petitioners' motion on February 27, 2009.

Summary judgment pursuant to Rule 56 of the Minnesota Rules of Civil Procedure is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law. Minn. R. Civ. P. 56.03. Summary judgment is not intended as a substitute for trial when there are factual issues to be determined. *Naegle Outdoor Advertising Co. of Minneapolis v. City of Lakeville*, 532 N.W.2d 249, 252 (Minn. Ct. App. 1995). The burden is on the moving party to show the absence of any genuine issue of material fact. Minn. R. Civ. P. 56.03; *Bixler v. J.C. Penney Co.*, 376 N.W.2d 209, 215 (Minn. 1985). Once the moving party has made a prima facie case that entitles it to summary judgment, the burden shifts to the nonmoving party to produce specific facts that raise a genuine issue for trial. *Bebo v. Delander*, 632 N.W.2d 732, 737 (Minn. Ct. App. 2001)(citing Minn. R. Civ. P. 56.05; *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988)). The party resisting summary judgment must do more than rest on mere averments or unsupported allegations, but must come forward with specific facts to satisfy its burden of production. *Bebo*, 632 N.W.2d at 737; Minn. R. Civ. P. 56.05. In analyzing a motion for summary

judgment, the court views the evidence in the light most favorable to the party opposing the motion. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

## **II. Petitioners' Renewed Motion for Summary Judgment is Granted in Part and Denied in Part**

The Minnesota Supreme Court has held that “[t]he opportunity of an absentee voter to cast his vote at a public election by mail has the characteristics of a privilege rather than of a right.” *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 733, n.8 (Minn. 2003)(quoting *Bell v. Gannaway*, 227 N.W.2d 797, 802 (Minn. 1975)). As such, “the legislature may mandate the conditions and procedures for such voting.” *Id.* A citizen who exercises this privilege can register and vote, by the terms of the law, “only by complying with the provisions thereof[.]” *Bell*, 227 N.W.2d at 803; *see also Matter of Contest of School Dist. Election Held on May 17, 1988*, 431 N.W.2d 911, 915 (Minn. Ct. App. 1988). Minnesota law enumerates four specific grounds upon which an election judge may reject an absentee ballot based upon the ballot’s return envelope. Minn. Stat. § 203B.12, subd. 2.<sup>1</sup>

### **a. Certain Voters Have Provided Sufficient Evidence to Show a Right to Relief as a Matter of Law**

Petitioners provided individualized evidence with respect to certain voters in support of their individual claims for relief. Having reviewed all of the supporting evidence and documentation provided with the motion, the Court determines that the voters identified below have provided un rebutted evidence that their absentee ballots were legally cast and should be counted. Accordingly, the Court determines that

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<sup>1</sup> See Order February 10, 2009 for a full discussion of the relevant facts and applicable legal standards governing Petitioners’ renewed motion for summary judgment.

Petitioners are entitled to summary judgment with respect to the absentee ballots of the following individuals:

- Brenda Rengo of Carlton County (Nauen Aff. Ex. 1-A – 1-C);<sup>2</sup>
- Shirley VanDyck of Cass County (Nauen Aff. Ex. 2-A – 2-E);
- Arvid Blackbird of Dakota County (Nauen Aff. Ex. 3-A – 3-D);
- Laurence Engebretson of Dakota County (Nauen Aff. Ex. 4-A – 4-E);
- Caitlin Heinz of Dakota County (Nauen Aff. Ex. 5-A – 5-C);<sup>3</sup>
- Donald Applebee of Hennepin County (Nauen Aff. Ex. 6-A – 6-F);
- Donelda Applebee of Hennepin County (Nauen Aff. Ex. 7-A – 7-F);
- Todd Toner of Hennepin County (Nauen Aff. Exs. 10-A – 10-E);
- Eila Nelson of Lake County (Nauen Aff. Exs. 11-A – 11-E);
- Judith Conlow of Pine County (Nauen Aff. Ex. 12-A – 12-E);
- Emma Bruggeman of Ramsey County (Nauen Aff. Ex. 13-A – 13-E);
- Josephine Garcia of Ramsey County (Nauen Aff. Ex. 14-A – 14-E);

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<sup>2</sup> Contestants oppose Petitioners' motion for summary judgment with respect to Ms. Rengo on the grounds that her application cannot be found. However, the voter testified in her declaration under penalty of perjury that she fully completed her application pursuant to applicable law. In the absence of evidence to the contrary, the Court finds the unrebutted testimony of the witness sufficient.

<sup>3</sup> Ms. Heinz testified in her declaration that when she submitted her application for an absentee ballot, a clerk in Dakota County instructed Ms. Heinz to fill out a voter registration application along with her absentee ballot. (Nauen Aff. Ex. 5-A.) Ms. Heinz completed the voter registration application and enclosed the same with her absentee ballot. (Id.)

On February 26, 2009, the Court ordered county or local election officials to "open each ballot secrecy envelope containing the absentee ballot of each identified voter to determine whether the envelope contains a voter registration card or application [.]” Order February 26, 2009, p. 1. Pursuant to this Order, Ms. Heinz's absentee ballot return envelope and the enclosed secrecy envelope were opened in order to determine whether Ms. Heinz's voter registration materials were contained therein. The Court has since received confirmation that Ms. Heinz's voter registration materials were located within the secrecy envelope. In light of this information, and having determined that Ms. Heinz's absentee ballot return envelope was otherwise legally cast, the Court orders Ms. Heinz's absentee ballot to be opened and counted.

With this Order, the Court is not providing that every absentee ballot identified in the February 26, 2009 Order will necessarily be opened and counted. As the Court has stressed throughout these proceedings, absentee ballot return envelopes will only be opened and counted if the Court is satisfied that the ballot was otherwise legally cast. In the case of Ms. Heinz, sufficient evidence has been presented that her absentee ballot complied with all of the requirements of applicable Minnesota law.

- Sophia Hall of Ramsey County (Nauen Aff. Ex. 15-A – 15-E);
- Lora West of Stearns County (Nauen Aff. Ex. 18-A – 18-F).

**b. Certain Voters Have Not Provided Sufficient Evidence to Show a Right to Relief as a Matter of Law**

Upon review of the individualized evidence provided in support of Petitioners' renewed motion for summary judgment, the Court determines that it cannot rule at this time and on this evidentiary record that the voters identified below are entitled to judgment as a matter of law. Petitioners have not provided sufficient evidence to satisfy the Court that the absentee ballots of the following individuals complied with all of the requirements imposed by Minnesota law or that any failure to comply with the law was not due to fault on the part of the voter but due to official error. The Court refuses to order the opening and counting of any ballot without sufficient evidence that the voter who cast the ballot complied with all relevant statutory requirements (or that any failure to comply was not due to fault on the part of the voter). The Court will make factual determinations with respect to these voters at the appropriate time.

- Dennis Erickson of Hennepin County (Nauen Aff. Ex. 8-A – 8-C (insufficient evidence presented that the voter did not otherwise vote on Election Day);
- Dennis Peterson of St. Louis County (Nauen Aff. Ex. 16-A – 16-C (evidence presented that the voter did not provide his address on his absentee ballot return envelope).<sup>4</sup>

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<sup>4</sup> The Court addressed this issue directly in its Order of February 13, 2009, in which it clearly held that "an absentee ballot return envelope shall only be accepted where "the voter's name and address on the absentee ballot return envelope [is] the same as the information provided on the absentee ballot application."" (Order February 13, 2009, p. 10); *see also* Minn. Stat. § 203B.12, subd. 2(1). Minnesota law does not provide an exception for seven-digit Voter Identification Numbers placed on the address line in lieu of the address itself, nor has this Court adopted such an exception.

**c. The Court neither Grants nor Denies Petitioners' Motion for Renewed Summary Judgment for Certain Individual Voters**

Petitioners' motion for summary judgment includes individuals who submitted absentee ballot return envelopes lacking complete addresses for either the voter or the witness where the address cannot be readily ascertained from the face of the ballot itself, and individuals who moved units within apartment buildings in the same precinct without completing updated voter registration materials. At this time, the Court is not prepared to rule as a matter of law on whether providing a partial address or moving units within the same apartment building is sufficient to comply with the requirements of Minnesota Statute section 203B.12, subd. 2(1). The Court has heard and received evidence that a large number of absentee ballots may potentially fall within these categories. The Court will review these ballots on an individual basis at the appropriate time. Accordingly, the Court reserves ruling on whether the absentee ballots of the following individuals should be ordered opened and counted:

- Craig Lindquist of Hennepin County (Nauen Aff. Ex. 9-A – 9-E (evidence presented that voter was registered at a different apartment number than that indicated on his absentee ballot application and absentee ballot return envelope));
- June Srok of St. Louis County (Nauen Aff. Ex. 17-A – 17-E (evidence presented that the voter provided an incomplete address on her absentee ballot return envelope));<sup>5</sup>
- Orin Ottman of Winona County (Nauen Aff. Ex. 19-A – 19-E (evidence presented that the voter and the voter's witness provided incomplete addresses on the voter's absentee ballot return envelope).

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<sup>5</sup> Ms. Srok's absentee ballot return envelope was purportedly rejected for a date mismatch between when the voter dated her absentee ballot return envelope and when Ms. Srok's witness dated the absentee ballot return envelope. The Court held as a matter of law that "an absentee ballot return envelope is wrongfully rejected where the sole reason for rejection is a date mismatch and the ballot is otherwise legally cast." (Order February 23, 2009, p. 11.)



**III. Conclusion**

For the aforementioned reasons, the Court grants in part and denies in part Petitioners' Renewed Motion for Summary Judgment. Any other relief not specifically ordered herein is denied.