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FILED
Court Administrator

MAR 11 2009

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

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

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

Cullen Sheehan and Norm Coleman,

Contestants,

**ORDER ON CONTESTEE'S MOTION
IN LIMINE TO EXCLUDE
IMPROPER 'CERTIFICATIONS'
UNDER MINN. R. EVIDENCE. 803(10)**

vs.

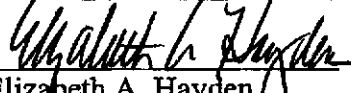
Al Franken,

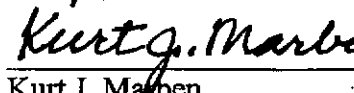
Contestee,

This matter came before the Court on March 6, 2009 for hearing on Contestee's Motion in Limine to Exclude Improper 'Certifications' Under Minnesota Rule of Evidence 803(10). After consideration of the arguments of counsel, the written submission of the parties, and the pleadings in the case, IT IS HEREBY ORDERED:

1. Contestee's motion in limine is granted in part and denied in part.
2. Contestants shall have until March 16, 2009 at 12 p.m. to submit certifications in the form of the attached Exhibit B for certifications previously provided to the Court from the counties and cities identified in the attached Exhibit A.
3. Failure to provide certifications in accordance with Paragraph 2 of this Order shall result in the Court refusing to admit the certifications previously provided to the Court from the counties and cities identified in the attached Exhibit A.
4. The Court refuses to admit into evidence the following exhibits: C701, C717, C732, C748, and C768.
5. The attached Memorandum and Exhibits are incorporated as if fully set forth herein.
6. Any other relief not fully set forth herein is expressly denied.

Dated: March 11 2009


Elizabeth A. Hayden
Judge, District Court


Kurt J. Marben
Judge, District Court


Denise D. Reilly
Judge, District Court

MEMORANDUM

I. Procedural Posture and Factual Background

On February 24, 2009, Contestants e-mailed county and city election officials seeking certifications pursuant to the Minnesota Government Data Practices Act. Contestee filed a motion in limine on February 25, 2009 seeking to exclude the certifications sought by Contestants on the grounds that the certifications sought constituted inadmissible hearsay. The Court heard oral argument that same day. On February 26, the Court issued an Order granting Contestee's motion and ruled that the certifications sought by Contestants were inadmissible hearsay and did not fall within any hearsay exceptions. (Order of Feb. 26, 2009 at 8)

In its Order of February 26, the Court concluded that a certification created by a government official in response to a request for certification by a party engaged in litigation was not an existing public record excluded from the hearsay rule under Minnesota Rule of Evidence of 803(8). (Order of Feb. 26, 2009 at 6.) However, the Court concluded that under Rule 803(10), a county official could conduct a review of official records, and certify to the non-existence of a record showing that an individual voted in his or her precinct or within the county on Election Day. (*Id.* at 7.) The Court also noted that certified copies of Election Day incident reports and voter rolls could properly be entered into evidence under Rule 803(8). (*Id.*)

In response to the Court's Order of February 26, 2009, Contestants served subpoenas upon county and city election officials seeking certified copies of records relating to identified voters or certifications that the identified records did not exist. Specifically, Contestants sought the following documents for identified voters: (1) certified copies of the voters' absentee ballot applications; (2) in the event no absentee ballot application for the voter was found, a certification that a diligent search failed to find an application in the records; (3) a certification

that after a diligent search, including review of registration rosters for the precinct in which the voters submitted an absentee ballot, no evidence was located that the voter voted in person on Election Day or by another absentee ballot in the precinct in which he or she voted.

Contestants provisionally rested their case on Monday, March 2, 2009 but, with approval of the Court, reserved the right to provide certifications from the subpoenaed election officials to the Court by noon on Wednesday, March 4, 2009. Contestants provided a large number of certifications to the Court by this deadline, but Contestee objected to the Court's receipt of the proffered certifications arguing that many did not comply with the requirements of the Court's February 26th Order. The Court then ordered the parties to meet and confer in an attempt to resolve the objections to the certifications. The Court did not accept the certifications into evidence, but instead directed Contestants to organize the records by county or city.

On March 5, Contestee served this motion in limine. Contestants did not file a formal memorandum in opposition to Contestee's motion but provided an informal opposition in the form of a spreadsheet. The Court heard argument on this motion on March 6, 2009. Prior to the hearing, the parties met and conferred as required by the Court.

II. Contestants Shall Provide the Court with Certifications that Comply with Rule 902

Contestee continues to argue that certain certifications provided by Contestants are inadmissible hearsay. Specifically, Contestee argues that certifications lacking an official seal do not comply with Rule 902, and, thus, do not fall within the scope of Rule 803(10)'s exception to the hearsay rule. Rule 902 provides that certain types of documents are 'self-authenticating,' including certified copies of public records:

A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public

office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Legislative Act or rule prescribed by the Supreme Court pursuant to statutory authority.

Minn. R. Evid. 902(4). Paragraphs 1 and 2 of Rule 902 require a certification of public documents to be under seal. Minn. R. Evid. 902(1) & 902(2). Rule 803(10) specifically incorporates Rule 902 and provides “[t]o prove the absence of a record, report, statement or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.” Minn. R. Evid. 803(10) (emphasis added).

The plain language of Rule 902 and 803(10) require certifications relating to public records to be signed and sealed before they may be considered to be a self-authenticating document admissible without further foundation. Contestants argue that this Court should accept certifications that lack a seal if they are acknowledged in accordance with Rule 902(8). However, Minnesota law requires certifications of public records to bear an official seal. Minn. Stat. 600.13 (“A copy of [an original record made by any public officer in the performance of official duty], or of any document which is made evidence by law and is preserved in the office or place where the same was required or is permitted to be filed or kept, or a copy of any authorized record of such document so preserved, when certified by the person entitled to the official custody thereof to have been compared by that person with the original and to be a correct transcript therefrom, shall be received in evidence in all cases, with the same force and effect given to such original document or record; but if such officer have, by law, an official seal, the certificate shall be authenticated thereby.”); *see also* Minn. R. Civ. P. 44.01(a) (regarding

proof of official records and requiring the affixing of a seal thereto). Accordingly, the Court holds that certifications presented by Contestants without an affixed seal may not be received into evidence as self-authenticating documents.

The Court notes that Contestants' subpoenas specifically sought certifications bearing an official seal. The Court does not believe the failure of local officials to supply the requisite seal should preclude Contestants from proffering certifications that otherwise comply with the Court's Order of February 26, 2009. Accordingly, Contestants shall have until 12 p.m. on March 16, 2009 to submit certifications bearing a proper seal for the certifications previously provided to the Court from the counties and cities identified in the attached Exhibit A.¹ Insofar as Contestants have already provided the Court with certifications showing an official seal, they need not seek any additional certification to comply with this Order.

In order to satisfy the requirements of this Order, Contestants may provide a certification to the official who responded to the earlier subpoena certifying the authenticity of any information provided in the earlier response. The Court will accept sealed certifications substantially in the form of the attached Exhibit B. The officials need not undertake any additional review of their records and the Court shall not accept any additional information responsive to the earlier subpoena in response to any certification request issued as part of this Order.

III. The Court is Satisfied That the Certifications Were Made After Diligent Search

Contestee objects to certain certifications proffered by Contestants on the grounds that these certifications do not specifically recite that the official undertook a diligent search for the records. Contestants' subpoenas specifically directed the subpoenaed officials to undertake a

¹ By way of this Order, the Court is not reopening Contestants' case in chief. Contestants may simply submit a sealed certification authenticating the information provided to the Court on March 4, 2009.

diligent search of their records to determine whether certain voters had voted in person. (*See, e.g.*, Ex. 700 at IV.2 (“To the extent the absentee ballot application for the voter has not been located, a certification that a diligent search has failed to find an application in the records.”) & IV.3 (“A certification that after a diligent search, including review of the registration rosters for the precinct in which the voter submitted an absentee ballot, no evidence has been located that the voter voted in person on election day or by another absentee ballot in the precinct in which he or she was registered.”). In response to Contestants’ subpoenas, certain cities and counties provided the requested certifications.

Given the clear language of the subpoenas requesting certifications only after officials undertook a diligent search, the Court refuses to presume that the officials providing certifications failed to complete a diligent search. Indeed, the Court notes that many of the certifications to which Contestee objected contained language indicating that the official did undertake the necessary search for records in accordance with Rule 803(10) even if they did not specifically reference “a diligent search.” (*See, e.g.*, C756 (“I certify that I personally reviewed these absentee ballot envelopes, applications, Election Day Rosters and found the above information to be correct.”).) Accordingly, the Court refuses to strike any certifications provided in response to Contestants’ subpoenas for failure to recite that the certification was made after a diligent search.

IV. The Court Shall Not Strike Any Certification Other Than That From Anoka County as Overbroad

Contestee also argues that certain certifications are too overbroad and should not be admitted into evidence because they go beyond the scope of the information requested by Contestants’ subpoena or admissible under Rule 803. Specifically, Contestee objects to any narrative responses provided in the certifications. The Court notes that Contestants have

redacted the bulk of the information to which Contestee objected. (*See, e.g., C773.*) Furthermore, as factfinder, the Court determines the weight of the evidence provided by the parties, including the information provided by way of the certifications. However, the certification from Anoka County goes far beyond certifying the existence or non-existence of certain public records. (*See C701.*) As such, it is inadmissible hearsay and shall not be considered by the Court. The Court shall not consider the evidence provided by C701.

Contestee also objects to portions of other certifications on the grounds that they fail to limit their scope to a particular precinct's records. The Court has reviewed these certifications and shall admit them with the understanding that they were made in response to Contestants' subpoenas which specifically sought certifications that "no evidence has been located that the voter voted in person on election day or by another absentee ballot in the precinct in which he or she was registered." Accordingly, certifications attesting that a voter did not otherwise vote on Election Day or by other absentee ballot shall be construed by this Court to be limited to the precinct in which the voter was registered.

V. The Court Shall Strike Untimely Certifications

Finally, Contestee objected to certain certifications provided by Contestants as untimely. These certifications were not proffered to the Court by the deadline of noon on Wednesday, March 4 but were instead provided to the Court on Friday, March 6, 2009. At oral argument, Contestants themselves acknowledged that certain certifications were untimely, specifically those from Grant County, Minneapolis, Itasca County, and Ramsey County. At the hearing, Contestants argued that the Court should accept untimely certifications. Contestants rested their case on March 4, 2009 and cannot continue to submit evidence in their case-in-chief. The Court clearly instructed Contestants that it would not accept any certifications received after noon on

March 4, 2009. Contestants have failed to show good cause for their failure to abide by the terms of a direct order from this Court. Accordingly, the Court refuses to accept into evidence the following exhibits: C717, C732, C748, and C768.

VI. Conclusion

For the reasons set forth above, Contestee's motion in limine to exclude certifications is granted in part and denied in part.

EXHIBIT A

1. Anoka County
2. Blue Earth County
3. Carver County
4. Chisago County
5. Clay County
6. Cottonwood County
7. Crow Wing County
8. Dakota County
9. Douglas County
10. Fillmore County
11. Freeborn County
12. Goodhue County
13. Hennepin County – City of Crystal²
14. Hennepin County – City of Eden Prairie
15. Hennepin County – City of Edina
16. Hennepin County – City of Golden Valley
17. Hennepin County – City of Greenfield
18. Hennepin County – City of Hanover
19. Hennepin County – City of Minnetonka
20. Hennepin County – City of Maple Grove
21. Hennepin County – City of Orono
22. Hennepin County – City of Richfield
23. Hennepin County – City of Robbinsdale
24. Hennepin County – City of Rogers
25. Hennepin County – Saint Anthony Village
26. Hubbard County
27. Itasca County
28. Jackson County
29. Kanabec County
30. Kandiyohi County
31. Koochiching County
32. Le Sueur County
33. Lyon County
34. Meeker County
35. Mower County
36. Redwood County
37. Saint Louis County

² Contestee does not object to the certifications from Crystal, Eden Prairie, Minnetonka, or Hubbard County for lack of seal. The copies received by the Court appear to lack the requisite seal and should be supplemented in accordance with this Order.

EXHIBIT B

Certification of Records

I, [INSERT NAME AND TITLE], hereby state and certify that:

1. The information provided by me or my office in response to a trial subpoena issued by Contestants in Court File No. 62-CV-09-56, *In re Contest of General Election held on November 4, 2008 for the purpose of electing a United States Senator from the State of Minnesota* was true and correct to the best of my knowledge, information and belief.
2. The information provided in this Certification of Records is true and correct to the best of my knowledge, information, and belief. Accordingly, I have affixed hereto the official seal of my office.

Name

Title

County or City

AFFIX SEAL