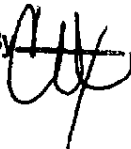


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Court Administrator

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By  Deputy

STATE OF MINNESOTA  
COUNTY OF RAMSEY

DISTRICT COURT  
SECOND JUDICIAL DISTRICT

Court File No. 62-CV-09-56

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,

Contestants,

v.

Al Franken,

Contestee.

Dennis Peterson, et. al.,

Supreme Court File No. A09-65

Petitioners,

v.

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

Respondents.

**CONTESTANTS' OPPOSITION TO SECOND RENEWED  
MOTION FOR SUMMARY JUDGMENT**

**INTRODUCTION**

Contestants do not support a remedy that would disenfranchise Minnesota voters whose ballots already have been counted. We would prefer to respond to Petitioners' renewed motion for summary judgment as we did the first such motion: let these ballots be counted so long as all similarly situated ballots are counted as well. The Court's rulings, however, dictate otherwise. Moreover, subsequent events have shown that Petitioners' declarations and affidavits are not

always trustworthy; nor are the registration records used to support them. As a result, Contestants must oppose Petitioners' motion.

Petitioners' motion should be denied as to two of the three voters for which judgment is sought. As to these, the proffered evidence either demonstrates that they cannot meet the Court's standard for a legally cast vote or the proffered evidence is incomplete. These voters have not met their burden of proof.

### **ARGUMENT**

Summary judgment is a blunt instrument. It should be used only when the moving party has satisfied the Court that there is no genuine issue of material fact and judgment should be granted in his or her favor. Minn. R. Civ. P. 56.03; Anderson v. State Dep't of Natural Res., 693 N.W.2d 181, 186 (Minn. 2005). All facts must be viewed in the light most favorable to the non-moving party. State Farm Fire & Casualty v. Aquila Inc., 718 N.W.2d 879, 883 (Minn. 2006). Here, that means the Court must cast a wary eye on self-serving declarations and must scrutinize the documentary evidence; if it is not clear that the statutory standard has been met, summary judgment should be denied.

The individualized evidence submitted with the Petitioners' motion is insufficient to satisfy the Court's February 13, 2009 Order and, in several instances, contradicted by the supporting documentation attached to the voters' declarations. These voters must be required to provide live testimony in Court subject to cross-examination by the Contestants. Kleingbeil v. Truesdell, 98 N.W.2d 134, 140 (Minn. 1959) ("The right of cross-examination is an inviolate

right. . . . which is of fundamental importance in the discovery of truth in the trial of a case.”); State v. Pearson, 110 N.W.2d 206, 214 (Minn. 1961) (“the right to cross-examination is fundamental to any adversary proceeding”); see also Woods v. Robb, 171 F.2d 539, 541 (5th Cir. 1948) (“the best test of the rights of the movant” is a trial on the merits). This cross-examination will permit the Court to receive testimony regarding the issues raised in each voter’s declaration or affidavit, as the case may be, and, in some instances, the disconnect between the plain language of a voter’s declaration and the documentation attached to the declaration. In doing so, the Court will have the opportunity to weigh the reliability of the statements contained in each voter’s declaration.

Listed below are the voters included in the Petitioners’ motion and Contestants’ concerns regarding the adequacy of the evidence presented.

1. Katie Kaszynski

It appears from the documentation submitted there are several problems that, under the Court’s standard, would preclude Ms. Kaszynski’s ballot from being a legally cast vote. First, despite the declaration, a comparison of the signature on the operative absentee ballot application with that on the envelope suggests rather strongly that the signature on the application is that of Ms. Kaszynski’s mother. Second, there is no independent proof Ms. Kaszynski herself is registered. Third, given that Ms. Kaszynski is a college student in Illinois and signed the certification in the middle of the week, the fact that her mother signed as her witness dated two days later suggests rather strongly that her

mother did not actually witness Ms. Kaszynski fill out her ballot. In these circumstances, it cannot be said as a matter of law the ballot should be counted, unless the Court decides to revert to a substantial compliance standard.

2. Tempest Moore

The documentation submitted makes clear that Ms. Moore's ballot cannot satisfy the Court's standard to be considered a legally cast vote. First, the witness failed to check a proof of residence box. Second, the witness herself was not registered until November 4, 2008 – after she witnessed Ms. Moore's ballot. Third, the witness and voter both dated the ballot on October 28, 2008 but the Ramsey Count date stamp is October 27, 2008, an unusual fact given that Ms. Moore apparently received the ballot in Chicago where she is a college student. Fourth, the voter misspelled her own name on the certification which, together with the date issue, casts suspicion regarding who signed the certification and when. In these circumstances, Ms. Moore is not entitled to summary judgment that her ballot is a legally cast vote.

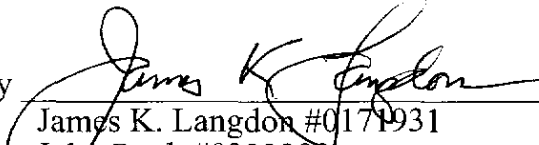
**CONCLUSION**

For all of the foregoing reasons, Contestants respectfully request this Court deny Petitioners' motion as to voters Kaszynski and Moore.

Dated: March 18, 2009

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