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STATE OF MINNESOTA  
COUNTY OF RAMSEY

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,

**MEMORANDUM OF LAW IN  
SUPPORT OF CONTESTEE'S  
MOTION FOR INVOLUNTARY  
DISMISSAL AFTER THE CLOSE  
OF CONTESTANTS' CASE**

v.

Al Franken,

Contestee.

**I. INTRODUCTION**

After five weeks of trial, the Court has now heard the entirety of Contestants' affirmative case. This has consisted of testimony from a handful of voters who attempted to vote for Coleman, as well as election officials, primarily from jurisdictions that heavily favored Coleman. Even without the presentation of Contestee's rebuttal case and counterclaims, it has become clear that the bulk of Contestants' claims fail as a matter of law. For example, despite the many weeks of testimony, Contestants have failed to meet their burden of proving that a voter's absentee ballot was improperly rejected with respect to the vast majority of ballots they challenge. With respect to many of Contestants' other claims—such as that ballots were mutilated and that challenged ballots were improperly rejected or accepted by the State Canvassing Board—they have failed to provide any evidence at all.

This Court should dismiss those claims, or portions of them, for which Contestants have failed to carry their burden of proof "on the ground that upon the facts and the law, the plaintiff has shown no right to relief." Minn. R. Civ. P. 41.02(b). To the extent the Court deems some but not all of the claims still provable, it should grant partial judgment for Contestee.

Having permitted Contestants five weeks to put on their case, the Court should now effectuate the state's longstanding, declared commitment to expedient election contests. Judicial efficiency, sound public policy, and statutory intent would all be served by the Court defining what remains of Contestants' claims at this point.

## II. ARGUMENT

### A. Legal Standard

Rule 41.02(b) of the Minnesota Rules of Civil Procedure provides that "[a]fter the plaintiff has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law, the plaintiff has shown no right to relief. In an action tried by the court without a jury, the court as trier of the fact may then determine the facts and render judgment against the plaintiff . . . ." Pursuant to this Rule, the court may also dismiss "for failure to prosecute or to comply with these rules or any order of the court." Minn. R. Civ. P. 41.02(a). Such dismissals operate as an adjudication on the merits, unless otherwise specified by the court. Minn. R. Civ. P. 41.02(c); *see also Lampert Lumber Co. v. Joyce*, 405 N.W.2d 423 (Minn. 1987).

Rule 41.02(b) permits the trial judge to view plaintiff's evidence in the same light that the judge would view that evidence if the defendant rested without submitting any additional proof. In these circumstances, the trial judge, as the finder of fact, must determine credibility, draw

factual inferences, and otherwise weigh the evidence. David F. Herr & Roger S. Hadock, 1A Minn. Prac., Civil Rules Annotated R. 41.02 (4th ed. 2008). "If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52.01." Minn. R. Civ. P. 41.02(b).

**B. The State Interest in Finality and the Pleading and Evidentiary Requirements Clearly Established by Statute, Precedent, and this Court's Prior Rulings Support a Judgment in Favor of Contestees.**

The ability to enter judgment for a defendant at the end of a plaintiff's case is an essential tool of judicial management in all lawsuits, but it is particularly critical here. As this Court has observed, there is "strong public policy in favor of finality in elections". See Order Granting in Part and Denying in Part Contestee's Conditional Motions for Partial Summary Judgment, Ct. File No. 62-CV-09-56, at 4 (Feb. 23, 2009) ("Feb. 23 SJ Order") (quoting *McNamara v. Office of Strategic and Long Range Planning*, 628 N.W.2d 620, 631 (Minn. Ct. App. 2001). "[T]he whole system [is] intended to expeditiously dispose of election contests. . . . [T]he general idea inherent in the statute [is] that there may be a speedy determination of these matters . . . .". *Franson v. Carlson*, 137 N.W.2d 835, 840 (Minn. 1965); see also U.S. Const. Art. I, §§ 3, 4, Ams. XVII & XX; 2 U.S.C. §§ 1, 1a & 1b (establishing time-line for seating of U.S. Senators).

In part because of the state interest in finality of elections, a contestant must "clearly state the points [upon which he or she brings suit]" in his Notice and "file [this] notice soon after the election." *Greenly v. Independent School Dist. No. 316*, 395 N.W.2d 86, 90 n.1 (Minn. App. 1986). A Notice of Contest is sufficient only "if it states facts sufficient to apprise the contestee of the grounds of the contest so that he is given a fair opportunity to meet the asserted claims." Order on Contestee's Motion to Dismiss, Ct. File No. 62-CV-09-56 at 7 (Jan. 22, 2009) (citing (*Greenly*, 385 N.W. 2d at 90, n.1); see also Minn. Stat. § 209.021; Order on Contestee's Motion

in Limine to Limit Absentee-Ballot Evidence to Ballots Pleaded in the Notice of Contest, Ct. File No. 62-CV-09-56, at 3 (Feb. 3, 2009) ("In Limine Order") (citing *Christensen v. Allen*, 119 N.W.2d 35, 39 (Minn. 1963)).

Not only must a contestant adequately plead his claims, but as this Court has correctly ruled, the contestant also bears the burden of proof with respect to ballots he wants counted. See Order Following Hearing, Ct. File No. 62-CV-09-56 (Feb. 13, 2009) at 4-5 ("Feb. 13 Order Following Hearing"); see also *Kearin v. Roach*, 381 N.W.2d 531, 533 (Minn. App. 1986) ("The certificate of the proper canvassing board declaring the result of an election is prima facie evidence of the result and places on a contestant the burden of showing that the person declared elected did not receive a majority of the legal votes."); see also *Bank v. Egan*, 60 N.W.2d 257, 258 (Minn. 1953) ("[T]he burden rests on the petitioner to prove the allegations of his petition."); *Blake v. Hogan*, 58 N.W. 867, 868 (Minn. 1894) (evidence with respect to specific votes casts must be "fairly clear and convincing").

Thus, in this case, the Court has expressly ruled that the scope of Contestants' challenge is limited to only those ballots that were "specifically disclosed to Contestee by name as of January 23, 2009." In Limine Order at 1; 4-5; see also Order Following Hearing, Ct. File No. 62-CV-09-56 (Feb. 13, 2009) at 3, n.1 ("Feb. 13 Order Following Hearing"); Order on Contestee's Motion in Limine to Exclude Testimony of King Banaian, Ct. File No. 62-CV-09046 (Feb. 18, 2009) ("Banaian Order"). Furthermore, this Court has made clear that the burden on the party seeking to have votes counted "in this election contest is to show that the ballots . . . were legally cast." Feb. 13 Order Following Hearing at 5. This burden cannot be met "simply by showing that ballots were wrongfully rejected." *Id.* "Ultimately, it remains the responsibility

of the moving party to ensure the sufficiency of the evidence" with respect to any particular claim. Feb. 23 SJ Order, at 13 n.3.<sup>1</sup>

**C. Having Failed to Meet Their Burden, All of Contestants' Claims Presented in Their Notice of Contest Fail as a Matter of Law**

As detailed below and illustrated in the attached affidavit and exhibits, Contestants have failed to meet their burden with respect to each of the claims pleaded in their Notice of Contest. As a matter of fact and law, the claims simply cannot be maintained. Judgment should be awarded to Contestee and this case should be dismissed. *See* Minn. R. Civ. P. 41.02(b).

Each paragraph of Contestant's Notice that can be construed as presenting a claim is discussed in turn:

**1. Unidentified and Unspecified Errors (Paragraph 9)**

In Paragraph 9 of their Notice of Contest, Contestants alleged that unidentified "errors, mistakes and other irregularities," including "matters and things," took place or affected the outcome of the Election. But the Notice provided absolutely no basis for Contestee to identify or respond to the unspecified issues. Nor have Contestants clarified this claim during the five weeks of their affirmative case. Accordingly, to the extent Paragraph 9 presents a claim, Contestee is entitled to judgment on it.

**2. Improperly Rejected Absentee Ballots (Paragraphs 10 and 11).**

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<sup>1</sup> Where Contestants have made offers of proof without introducing particular documents into the record, those documents do not qualify as evidence but rather preserve these matter for later appeal. *See Santiago v. State*, 644 N.W.2d 425, 442 (Minn. 2002); *see generally* Contestee's Memorandum of Law Regarding Form and Level of Specificity Required in an Offer of Proof (filed 2/20/09). This brief therefore ignores Contestants' Offers of Proof and relies only on evidence properly admitted into the record.

In Paragraphs 10 and 11 of their Notice, Contestants alleged that absentee ballots were erroneously excluded from the vote totals certified by the State Canvassing Board, due to improper rejection on Election Day and/or during the recount, including following the Minnesota Supreme Court's December 18, 2008 Order. Notice of Contest ¶¶ 10, 11. On February 3, 2009, this Court held that the scope of Contestants' challenge to improperly rejected absentee ballots would be limited to the approximately 4,800 absentee ballots that Contestants had specifically disclosed to Contestee prior to January 23, 2009. *See* In Limine Order. Subsequently, the Court made clear that to prevail on having those ballots counted, Contestants would need "to show that the ballots . . . were legally cast," not simply that they "were wrongfully rejected." Feb. 13 Order Following Hearing at 5; *see also* Order Granting in Part and Denying in Part Contestee's Conditional Motions for Partial Summary Judgment, Ct. File No. 62-CV-09-56, at 11 (Feb 23, 2009) ("Feb. 23 SJ Order") ("[T]he Court cannot order these ballots to be opened and counted until it is satisfied," based on "evidence", "that such ballots have been legally cast.").

Following this Court's February 13, 2009 Order, Contestants withdrew over one thousand of the initial 4,800 contested ballots, leaving 3,687 at issue. *See* Affidavit of Ben Stafford in support of Contestee's motion to dismiss ("Stafford Aff."), Ex. A (2/17/09 email from Jim Langdon). For the reasons discussed below, contestants have failed to meet this burden with respect to the vast majority of these 3,687 ballots.<sup>2</sup>

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<sup>2</sup> This Motion reflects evidence entered into the record as of Monday, March 3, 2009, which was the date on which the Contestants provisionally rested. It does not reflect evidence that may eventually be entered in the event that the Court accepts any of the certifications originally offered on Wednesday, March 5, 2009. Contestee's argument in this Motion does not mean, in any event, that none of these voters cast legal ballots, but rather that Contestants have failed to meet their burden of proof. Contestee has pleaded a number of these ballots in his counterclaim and may be able to prove the validity of those ballots through the introduction of testimony and additional documentation in his case.

**a. Contestants must prove that each absentee ballot met all of the mandatory criteria before it can be counted**

As this Court has recognized, unlike voting at the polls, voting via absentee ballot is a privilege, not a right. Feb 13 Order Following Hearing at 8-9. Voters exercising the privilege of voting by absentee ballot may not evade the requirements of Minnesota law. *Id.*; *see also Bell v. Gannaway*, 227 N.W.2d 797, 802-03 (Minn. 1975) (holding that absentee ballot requirements are mandatory and identifying "the prevention of fraud" and the efficient processing of ballots as central purposes of restrictions on absentee voting). The ultimate responsibility for complying with the absentee ballot requirements "lies squarely at the feet of the voter," Feb. 13 Order Following Hearing at 12, and the burden for demonstrating compliance with the requirements is on the party seeking to have the ballot counted, *id.* at 5; *see also* Feb. 23 SJ Order, at 13 n. 3 ("Ultimately, it remains the responsibility of the moving party to ensure the sufficiency of the evidence.").

Accordingly, to demonstrate that a ballot was legally cast, Contestants must prove a number of facts through competent evidence. First, they must show that each ballot they wish to have counted was submitted by a registered voter. *See* Feb. 13 Order Following Hearing at 5-6 (discussing Minn. Stat. §§ 201.018, 201.054, 201.061, 201.071). To be valid, a registration application must have contained all of the information required by Minn. Stat. § 201.071. Feb. 13 Order Following Hearing at 6. It also must have been received by October 14, 2008, or submitted as part of a same-day registration application. Even if a voter's failure to register is a result of official errors or omissions, his or her vote cannot be counted. *Id.* at 7. If a voter moves, including within a precinct, and including just to a new apartment, he or she must reregister. Order on Intervenor's Rule 60.02 Motion to Vacate Judgment, S. Ct. File No. A09-65, at 6 (Mar. 2, 2009).

In addition, Contestants must demonstrate that the voter complied with all of the statutory requirements for absentee voting. *Id.* at 8. Specifically, they must demonstrate that:

- The voter completed an absentee ballot application. *See* Minn. Stat. §203B.12, subd. 2; *see also id.* §203B.04;
- The name and address provided on the absentee ballot return envelope matched the name and address provided on the absentee ballot application. Feb. 13 Order at 10 (citing Minn. Stat. § 203B.12, subd. 2(1));
- The absentee ballot application contained the voter's signature, unless signed by another in accordance with Minn. Stat. § 645.44, subd. 14. Feb. 13 Order at 2, 11-12 (citing Minn. Stat. §§ 203B.04, subd. 1, 203B.12, subd. 2(2));
- The absentee ballot was submitted in a return envelope signed by the voter in the certification box, unless there is evidence that the envelope was hand-delivered and accepted by local officials without providing the voter the opportunity to correct the certification. Feb. 13 Order at 13-14; Order on Intervenor's Rule 60.02 Motion to Vacate Judgment, S. Ct. File No. A09-65, at 2-3 (Mar. 2, 2009); *see also* Minn. Stat. § 203B.12;
- The signature on the return envelope matched the "signature of the individual who made application for ballots." Minn. Stat. § 203B.12, subd. 2(2); Feb. 13 Order at 13;
- The absentee ballot was witnessed by a registered voter in Minnesota or a notary public or other individual authorized to administer oaths. *See* Minn. Stat. § 203B.07, subd. 3; §203B.08, subd. 1; Minn. R. 8210.0500, subps. 2 & 3; Feb. 13 Order Following Hearing at 14;

- The witness has provided a name, address, and signature. *See* Minn. R. 8210.0500, subs. 2 & 3; Feb. 13 Order Following Hearing at 14-15; Feb.20/2:00 (court ruling sustaining objection);
- The proof of residence box was checked. *See* Minn. Stat. § 203B.07 (requiring that if a voter is not previously registered at the time he signs his eligibility certificate, he must "provide[] proof of residence as required by section 201.061, subdivision 3); *see also* Minn. R. 8210.0600 (requiring, for example, a driver's license number if a driver's license or a utility bill is provided and voucher information if a voucher is used);
- The absentee ballot, if witnessed by a notary public, was affixed with a seal or stamp. Feb. 13 Order at 14;
- The absentee ballot was submitted by a voter registered in that particular precinct and at the same address. *Id.* at 15 (citing Minn. Stat. § 203B.07-.08 ; Minn. R. 8210.0500); Order on Intervenor's Rule 60.02 Motion at 6;
- The absentee ballot was timely received and properly delivered. Feb. 13 Order at 16;
- The voter was alive on Election Day. Feb. 23 SJ Order at 11; and
- The voter voted only once. Feb. 13 Order at 3.

Given these mandatory requirements, the question whether an absentee ballot was properly rejected must be determined on a case-by-case basis, and each determination requires consultation of materials beyond the face of the absentee ballot envelope itself. Feb. 13 Order at 5; Feb. 23 SJ Order at 11, 13 n.3.

**b. With respect to the vast majority of the ballots noticed, Contestants have failed to prove they were legally cast.**

Contestants have failed to prove that the vast majority of the ballots they sought to have counted were legally cast as required by this Court's orders.

As an initial matter, after the Court's February 13th Order, Contestants identified 3,687 ballots as still at issue in the contest. *See* Stafford Aff., Ex. B (list of 3,687 voters identified by Contestants).<sup>3</sup> Of these, contestants have withdrawn 136 ballots over the course of the trial. Stafford Aff., Ex. C. For example, on February 17, during Contestants' examination of Robert Hiiivala, the County Auditor of Wright County, Contestants' announced that they were withdrawing their challenge to the rejection of ballots from Constance Lynn and Joan Flygare. Similarly, on February 18, Contestants withdrew their challenges to the rejection of ballots from Kimberly Letendre-Olson and Jennifer Lentz of Scott County.

Contestants also abandoned their claim with respect to another 601 ballots that were rejected for signature mismatches. Stafford Aff., Ex. D (list of "signature mismatch" ballots withdrawn by Contestants). That is, though among the 3,687 voters, although Contestants initially produced a list of 786 ballots allegedly improperly rejected for signature mismatches, on Tuesday, February 24, they clarified that their claim with respect to signature matches only applied to 168 ballots. *Compare* Exhibit 9 to the Affidavit of John Rock in Support of Contestants' Motion for Summary Judgment *with* Stafford Aff., Ex. D *with* Exhibit C-613. During the course of the proceedings, Contestants withdrew 17 of these ballots. They therefore withdrew the other 601 ballots previously disputed.

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<sup>3</sup> There are minor discrepancies between the spellings of certain names on the attached spreadsheets and the spreadsheets submitted by Contestants and the Secretary of State. The differences appear to be due to difficulties in reading voters' handwriting on the absentee ballot envelopes, but they do not affect the ultimate analysis with respect to each voter.

Of the remaining 2,950 ballots, Contestants failed to introduce ballot envelopes for 1,473 voters. Stafford Decl., Ex. E. Consequently, they have necessarily failed to prove that these ballots were legally cast.<sup>4</sup> Without the envelopes in the record, they have not, for example, demonstrated that each voter's signature on the application matches that on the return envelope, or that his or her name and address are the same, or that the voter signed the envelope. Those requirements are all mandatory and are essential to safeguard the integrity of Minnesota's electoral system and to prevent fraud. Feb. 13 Order Following Hearing at 10-13.

That leaves 1,477 ballots. Of these, five were opened and counted on January 3, 2009 pursuant to the process established by order of the Minnesota Supreme Court. *See* Stafford Decl., Ex. F (1/21 spreadsheet provided by J. Gelbmann to the parties by email); *see also* Stafford Decl., Ex. G (list of five voters whose ballots were opened and counted on January 3, 2009). Accordingly, those ballots are no longer at issue.

Of these 1,472 ballots, Contestants have submitted an absentee ballot envelope and *not* an absentee ballot application for 1,151 (although four of these voters testified in person). *See* Stafford Decl., Ex. H. As Exhibit H demonstrates, Contestants have failed to submit documentation or testimony to prove that many of these ballots were validly cast. Specifically, either (1) Contestants have failed to introduce an absentee ballot application or a certification regarding the application;<sup>5</sup> or (2) despite the existence of an application or certification, the documentary evidence is insufficient to demonstrate the validity of the ballot. *See* Exhibit H.

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<sup>4</sup> For a handful of these voters, Contestants introduced live testimony. Those voters are addressed separately below.

<sup>5</sup> In the case of UOCAVA ballots, Contestants have failed to submit either the Federal Post Card Application or an absentee ballot application for 33 ballots. *See* Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 42 U.S.C. § 1973ff; Minn. Stat. § 203B.16 et seq. Minnesota enacted Minn. Stat. §§ 203B.16 to 203B.27 to implement UOCAVA. Minn. Stat. § 203B.16, Subd. 1. Except as otherwise provided by statute, "all the laws applicable to absentee ballots and absentee voters and all other provisions of the Minnesota Election Law apply to an absentee ballot board" reviewing UOCAVA ballots. Minn. Stat. § 203B.23, Subd. 3. Pursuant to Minn. Stat. § 203B.17, eligible overseas and military voters must submit an application for an absentee ballot to the county auditor where the voter maintains or last maintained residence in Minnesota. An application can only be accepted

The failure to submit an application or certification or testimony regarding the application is fatal: for these ballots, Contestants have not demonstrated that a voter filled out an application, that the voter's signature on the application matches that on the return envelope, or that his or her name and address are the same, or that the voter signed the envelope. Accordingly, Contestants have not shown that the ballots were legally cast.

Moreover, an application or certification is not sufficient to prove a ballot legally cast: The other materials submitted must demonstrate the validity of the ballots. Contestants have managed to submit both an envelope and an application (or adduced voter testimony regarding completion of an absentee ballot envelope) for 325 ballots. *See* Stafford Aff., Ex. I. In most instances, Contestants have not submitted evidence that a voter was registered (or otherwise alleged that the voter registration form may be in the secrecy envelope, *see* Order to Open Secrecy Envelopes, Ct. File No. 62-CV-09-56 (Feb. 26, 2009)). In nearly all instances, Contestants have not demonstrated that a registered voter's completion of his or her absentee ballot was properly witnessed. Even where such information exists, there are other facial invalidities with many of the ballots: For example, voter Richard Coughlin failed to sign his absentee ballot application. *See* Ex. C-400. Likewise, voter Laura Shoberg did not sign the certification on her absentee ballot envelope. *See* Ex. C-325.

In sum, there appear to be nine voters for whom an absentee ballot envelope and application, as well as some evidence of voter and witness registration, have been entered into evidence. There is, in addition, a similarly small number of voters for whom an absentee ballot

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where the voter provides certain information under oath. Minn. Stat. § 203B.17, subd. 2. Moreover, a ballot cannot be counted if the voter simply fails to register to vote. Minn. Stat. § 203B.24 (setting forth reasons to reject a UOCAVA ballot). Under UOCAVA, a voter can fulfill both requirements—that is, submit the voter registration application and the absentee ballot application—simultaneously through a federal post card. *See* 42 U.S.C. § 1973ff-1(a)(4). What no voter can do, however, is entirely opt out of the process. Either he submits a properly completed federal post card or otherwise complies with Minnesota's registration and application requirements.

envelope and application, as well as some evidence of voter registration, have been entered into evidence and where the ballot was possibly witnessed by a qualified official. While Contestee does not concede that even these ballots have necessarily met the legal requirements, they represent the small subset for which Contestants appear to have offered some proof relevant to elements required under the law. With respect to the rest of the ballots Contestants challenge (which constitutes the overwhelming majority of the total), Contestants have simply failed to present the most rudimentary of evidence. Contestee is entitled to judgment that Contestant has failed to meet their burden of proof as to these ballots.

**c. Contestants also withdrew from consideration or failed to establish the validity of the ballots for the 21 voters who testified**

Contestants introduced live testimony from 21 individual voters. The Court has deemed such testimony, as well as affidavits and declarations submitted by individual voters, "both probative and compelling." Order Granting Contestee's Motion in Limine, Ct. File No. 62-CV-09-56, at 9 n. 5 (Feb. 26, 2009). With respect to these voters, Contestants have come much closer to proving their case. Nonetheless, Contestants have withdrawn from consideration five of the voters who testified, and the record is fatally lacking for the 16 others.<sup>6</sup> Contestees are therefore entitled to judgment with respect to the voters who testified.

- Voter Gerald Anderson testified that he was registered to vote in the November 4, 2008 election, and that he cast an absentee ballot. Due to his failed vision, Voter Anderson's wife assisted him with the ballot and he signed the envelope in the space where she indicated. Anderson/Jan.27/1:40. However, he signed on the line available for a notary or other official to indicate his or her title, and left the space for the voter's signature blank. Ex. C-236; *see also* F-1652. Even assuming that, because of his disability, this failing does not invalidate his ballot, Contestants have failed to show that his ballot was

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<sup>6</sup> James Wadzinski, Elissa Jackson, Joel Koehnen and Janet Czech do not appear on Contestants' post-February 13 list of ballots at issue; their ballots have therefore been withdrawn. Douglas Thompson is a signature mismatch voter who testified that his girlfriend signed his application. Ex. C-241; Thompson/Jan. 27/2:30. Thus, he does not appear on Contestants' updated signature mismatch list, and has therefore been withdrawn. All of the voters are reflected in Contestee's spreadsheets

otherwise legally cast. Anderson provided no testimony, and Contestants provided no evidence, regarding whether he was registered at what at the time was his current residential address. Anderson/Jan. 27/1:35. He also provided no testimony, and Contestants provided no evidence, regarding whether his wife, who served as his witness, was a registered voter or a notary. *Id.*; *see also* Ex. C-236.

- Voter Eugene Markman testified that he was registered to vote in the November 4, 2008 election, but he provided no testimony regarding whether he was registered at what at the time was his current residential address. Markman/Jan. 27/2:00. Voter Markman also provided no testimony, and Contestants provided no evidence, regarding whether his witness was a registered voter or notary at the time the individual served as a witness. Furthermore, voter Markman's absentee ballot envelope includes a notation indicating "signature no match." *Id.* Contestants did not present the Court with the application or registration to ensure that they both exist and were properly completed.
- Voter Kevin Hendrickson testified that he was registered to vote in the November 4, 2008 election, but he provided no testimony regarding whether he was registered at what at the time was his current residential address. Hendrickson/Jan. 27/2:00. Voter Hendrickson also provided no testimony, and Contestants provided no evidence, regarding whether his wife, who served as his witness, was a registered voter or notary at the time she served as a witness.
- Voter Wesley Briest first testified that he had voted in person in the November 4, 2008 election, and specifically stated that he had not voted by absentee ballot. Briest/Jan. 27/2:14. After reviewing a copy of his absentee ballot envelope, he confirmed that he voted absentee and he appeared uncertain whether he had forgotten about his absentee ballot and also voted in person. *Id.* Contestants thus failed to show that voter Briest cast only one ballot. In any event, they also failed to show that his absentee ballot was valid: Voter Briest testified that he was registered to vote in the November 4, 2008 election, but he provided no testimony regarding whether he was registered at what at the time was his current residential address. Briest/Jan. 27/2:14. Although his wife witnessed the envelope, she did not provide an address. *Id.*; *see also* Ex. C-237. An election official marked the ballot "rejected" and wrote "No Witness Address." Ex. C-237. Finally, neither Voter Briest nor Contestants provided any information regarding whether his wife was a registered voter or notary at the time she served as a witness.
- Voter Mijanou Rodriguez Sampers testified that she completed the absentee ballot application form and received her absentee ballot and envelope in the mail. Sampers/Jan. 27/2:20. However, she provided no testimony, and Contestants provided no evidence, regarding whether she was registered to vote in the November 4, 2008 election. She also provided no testimony, and Contestants no evidence, regarding whether her mother, who served as her witness, was a registered voter or notary at the time that she served as a witness. Finally, voter Sampers' absentee ballot envelope includes a notation that says "signatures don't match." *Id.* Contestants did not present the Court with the application to ensure that they both exist and were properly completed or it could be confirmed that those documents were signed at all.

- Voter Peter DeMuth testified that he is registered to vote in Minnesota, DeMuth/Jan. 29/1:30, but he provided no testimony regarding whether he was registered at the address where he resides. DeMuth's testimony establishes that his absentee ballot does not contain a genuine signature: He manually signed his full name on his absentee ballot envelope but he did not sign his absentee ballot application. Instead, he digitally recorded his initials. DeMuth/Jan. 29/1:30; *see also* Ex. C-285. In addition, voter DeMuth provided no testimony, and Contestants provided no evidence, regarding whether his witness was a registered voter or notary at the time that he served as a witness and they provided no evidence regarding whether DeMuth only voted by absentee ballot.
- Voter Gayle Kecker testified that she was registered to vote in the November 2008 election, but provided no testimony regarding whether she was registered at what at the time was her current residential address. Kecker/Feb. 3/1:30. She testified that she applied for an absentee ballot because she was planning to be out of town on Election Day, but she was not in fact out of town on Election Day. *Id.* In fact, she signed in on the precinct polling roster on Election Day. Kecker/Feb. 3/1:30; Ex. C-315; F-1730, and she provided conflicting testimony as to whether she took a ballot at the polling place, though she maintained that she did not submit the ballot. Kecker/Feb. 3/1:30. In any event, Kecker provided no testimony and Contestants provided no evidence regarding whether Kecker's witness was a registered voter or notary at the time he served as a witness.
- Voter Anna Koehler testified that she was registered to vote on November 4, 2008, but provided no testimony regarding whether she was registered at what at the time was her current residential address. Koehler/Feb. 3/1:50; Ex. C-294. Voter Koehler also provided no testimony, and Contestants provided no evidence, regarding whether her witness was a registered voter or notary at the time that he served as a witness. In addition, her absentee ballot envelope contains no date stamp to verify when it was received by election officials. *Id.* Finally, notations on Voter Koehler's absentee ballot envelope suggest that officials concluded that the signature on the envelope was not the genuine signature of the individual who prepared the application. *Id.* Contestants did not present the Court with the application or registration to ensure that they both exist and were properly completed.
- Voter Margel Kirchhoff provided no testimony regarding whether she was registered to vote as of November 4, 2008 at what at the time was her current address. She testified that she signed her absentee ballot envelope but provided no testimony as to whether she signed her application for an absentee ballot; the application was not introduced into evidence. M. Kirchhoff/Feb. 9/9:00; *see also* Ex. C-361. The envelope contains no date stamp to verify when it was received by election officials. Ex. C-361. In addition, Kirchhoff testified that her sister signed her absentee ballot envelope as a witness and that her sister is a registered voter. However, her sister recorded a different address, not the address at which she was registered, on the form. *See* Ex. C-361.
- Voter Rodger Kirchhoff testified that he was registered to vote as of November 4, 2008, but provided no testimony regarding whether he was registered at what at the time was

his current residential address. He also provided no testimony regarding whether he completed or signed his absentee ballot application and Contestants did not introduce the application into evidence. R. Kirchhoff/Feb. 9/9:10; *see also* Ex. C-362. Though they introduced the envelope, it contains no date stamp to verify when it was received by election officials. Ex. C-362. Voter Rodger Kirchhoff testified that his sister-in-law signed his absentee ballot envelope as a witness. *Id.* However, Kirchhoff's absentee ballot envelope did not include the address at which his witness was registered. Rather, she included an address at a post office box. *Id.*

- Voter Kelton Adams provided no testimony regarding whether he was registered to vote as of November 4, 2008 at what at the time was his current address. He also provided no testimony regarding whether he completed or signed his absentee ballot application and Contestants did not introduce that application. *See* K. Adams/Feb. 9/9:13; *see also* Ex. C-364. In addition, Adam's absentee ballot envelope was witnessed by his daughter who, at the time of signing, was neither registered to vote at the address where she resided, nor was she authorized to administer oaths.
- Voter Marcella Adams provided no testimony regarding whether she was registered to vote as of November 4, 2008 at what at the time was her current address. She also provided no testimony regarding whether she completed or signed her absentee ballot application and Contestants did not introduce that application. In addition, Adams provided no testimony regarding whether she only voted by absentee ballot. Finally, her absentee ballot envelope was witnessed by her daughter, who, at the time of signing, was neither registered to vote at the address where she resided, nor was she authorized to administer oaths.
- Voter Laura Woods testified that she signed her absentee ballot envelope but she did not testify that she completed or signed an absentee ballot application. Woods/Feb. 9/2:00; *see also* Ex. C-363. No application was entered into evidence. In addition, Voter Woods testified that her mother signed as a witness, but neither she nor Contestants provided any information regarding whether this witness was a registered voter or notary at the time that she served as a witness. Woods/Feb. 9/2:00.
- Voter William Weitenbach provided no testimony regarding whether he was registered to vote as of November 4, 2008 at what at the time was his current address. Weitenbach testified that he did not understand that his legal signature was required on his absentee ballot application, so he signed his application with an abbreviated name. Weitenbach /Feb. 16/1:05. In addition, Weitenbach provided no testimony, and Contestants provided no evidence, regarding whether his witness was a registered voter or notary at the time that she served as a witness. Nor was any evidence presented regarding whether Weitenbach voted only by absentee ballot.
- Voter Jonathan Schultz provided no testimony regarding whether he was registered to vote as of November 4, 2008 at what at the time was his current address. Schultz also provided no testimony, and Contestants provided no evidence, regarding whether his witness was a registered voter or notary at the time that he served as a witness. Nor was any evidence presented as to whether Schultz voted only by absentee ballot.

- Voter Sara Banks provided no testimony and Contestants provided no evidence regarding whether Banks' witness was a registered voter or notary at the time that he or she served as a witness. They also provided no evidence as to whether she voted only by absentee ballot. *See* Banks/Feb. 16/1:15.

### **3. Duplicate Ballots (Paragraph 12(a))**

In paragraph 12(a) of their Notice, Contestants alleged that ballots "were counted twice during the Recount due to such Ballots being not marked as 'DUPLICATES' and matched with [their] 'Original' Ballot." Notice of Contest ¶ 12(a); Exhibits C, D. Contestants have presented insufficient evidence in support of their claims concerning ten precincts in Minneapolis, and they have presented no evidence at all in support of their claims concerning the remaining precincts and counties identified in their Notice. In any event, their claims are based on a misconstruction of the law and are barred as a matter of equity. All Contestants' duplicate-ballot claims therefore fail. *See* Feb. 23 SJ Order, at 11, 13 n. 3 ("Ultimately, it remains the responsibility of the moving party to ensure the sufficiency of the evidence.").

Contestee's Opposition to Contestants' Motion for an Order Declaring Recount Rule 9 Invalid as a Matter of Law ("Contestee's Opposition"), which is being filed with the Court on the same day at the instant Motion, sets forth the multiple, independent reasons why Contestants' claims fail as a matter of law. In summary, the reasons set forth in the opposition are as follows.

First, the methodology underlying Contestants' claims is fundamentally flawed. Contestants' claim for relief requires that this Court accept the accuracy of certain figures and classes of ballots relevant to Contestants' alleged double-counting claims. Yet it is not at all apparent how Contestants arrived at the figures they have provided in prior briefings. If anything, they appear to be using methods that the record clearly demonstrates to be unreliable. Moreover, Contestants have failed to enter into evidence certain voter-related materials that would be necessary to arrive at more accurate numbers; they have never provided a description

of their work for the Court's own review and check; and they have not allowed Contestee any opportunity for cross examination with respect to the accuracy of their proffered figures and tables. In short, Contestants have failed to set forth any methodology at all, much less one that might have allowed them to specify and substantiate their alleged double-counting claims.

The complete discussion of Contestants' failures of methodology is set forth in Contestee's separate filing. *See* Contestee's Opposition 14-17.

As a second ground for dismissal, Contestants have failed to prove, with respect to each individual precinct, either that there were more votes than voters or that double counting occurred. Contestants' entire case for double counting consists of a handful of rosters and challenged ballots they have admitted into evidence with respect to ten Minneapolis precincts, as well as the sporadic testimony of several election officials. At the outset, any double counting claim beyond those related to the ten Minneapolis precincts necessarily fails for lack of proof. As to the ten precincts for which Contestants submitted some sort of evidence, that evidence does not even approach what would be necessary to make the case. Without more, the rosters and challenged ballots prove nothing, and, with one exception, the testimony of their witnesses does not so much as address what might have occurred in a given precinct. The one exception comes in the form of indefinite hearsay from a witness whose credibility has been called into question. None of this evidence is sufficient to establish the existence of double counting in any given precinct.

The complete discussion of Contestants' failure of proof as to individual precincts is set forth in Contestee's separate filing. *See* Contestee's Opposition 17-19.

As a third ground for dismissal, Contestants have failed to prove, with respect to each individual precinct, that there were more votes than voters or that double counting occurred. The

record makes clear that the counting of original ballots often results in the proper enfranchisement of voters and that to refuse to count those originals would improperly negate those votes. Contestants nevertheless pursue their duplicative-ballot claim without pause or qualification.

The complete discussion of voter enfranchisement through the counting of original ballots is set forth in Contestee's separate filing. *See* Contestee's Opposition 19.

As a fourth ground for dismissal, for many of the same reasons it was proper to rely on the original ballots during the recount, *see* Contestee's Opposition 5-11, it is proper to rely on the original ballots for purposes of resolving an election contest brought pursuant to Minn. Stat. § 209.12. *Compare id.* ("[T]he only question to be decided by the court is which party to the contest received the highest number of votes legally cast at the election and is therefore entitled to receive the certificate of election.") *with* Minn. Stat. § 204C.35, subd. 3 ("A recount conducted as provided in this section is limited in scope to the determination of the number of votes validly cast for the office to be recounted."). As the Minnesota Supreme Court has held, "[t]here can be no dispute that unmatched original damaged ballots are valid ballots and the votes marked on those ballots should be counted in the election." *Coleman v. Minnesota State Canvassing Bd.*, 759 N.W.2d 44, 46 (Minn. 2008). Originals, not duplicates, are voters "legally cast" in an election, based both on the plain language of "cast" and the intention by the legislature that voter intent be discernible from the face of a legally cast ballot. What is more, the Secretary of State (by endorsing Rule 9) and the State Canvassing Board (by ratifying it) have made clear their determinations that, after the machine count of ballots has occurred, original ballots should be counted when available. Their interpretation is entitled to deference.

The complete discussion of the propriety of relying on original rather than duplicate ballots is set forth in Contestee's separate filing. *See* Contestee's Opposition 5-11.

Finally, for the same reasons Contestants are estopped from challenging Recount Rule 9, *see* Contestee's Opposition 11-14, they are estopped from pursuing their duplicate-ballot claims. The parties had agreed prior to the start of the recount that the original ballots would be counted. Contestants challenged this approach only after the entire recount and canvass proceeded on the basis of that agreement. In this circumstance, well-settled principles of Minnesota's common law, including the principles of estoppel and laches, prohibit Contestants from challenging the very process to which they agreed.

The complete discussion of estoppel and laches is set forth in Contestee's separate filing. *See* Contestee's Opposition 11-14; *see also* *id.* 1-4 (providing relevant factual background).

In short, Contestants have failed to proffer evidence sufficient to prove their claims concerning duplicate ballots. Moreover, their claims are based on a misconstruction of the relevant law and fail on that ground alone. Finally, equity bars Contestants from bringing their duplicate-ballot claims. The claims should be dismissed.

#### **4. Maplewood and St. Paul (Paragraph 12(b))**

In Paragraph 12(b) of their Notice of Contest, Contestants made allegations pertaining to ballots in Maplewood Precinct 6 and Saint Paul Ward 3, Precinct 9, as well as general, unspecified allegations that were never substantiated. *See also* Notice of Contest, Ex. E. On January 29, 2009, the parties stipulated to dismissal of Contestants' claims regarding Maplewood Precinct 6 and St. Paul Ward 3, Precinct 9. Contestants have presented no evidence in support of these claims.

**5. Missing Ballots: Minneapolis 3-1 (Paragraph 12(c))**

Paragraph 12(c) of Contestant's Notice contends that the State Canvassing Board erroneously certified election results from Minneapolis Ward 3, Precinct 1. In that precinct, 2,028 ballots were cast on Election Day, but only 1,896 ballots initially were found during the recount. Election officials found five Tyvek ballot envelopes. One was a different color and contained write-ins. The other four were labeled "2 of 5," "3 of 5," "4 of 5" and "5 of 5." There was no envelope labeled "1 of 5." After an extensive investigation, Minneapolis Director of Elections Cindy Reichert, as well as other elections officials, concluded that there was simply no doubt that the ballots had been cast, counted, and then lost; F-87 (Reichert report to State Canvassing Board). After hearing Reichert's report, and receiving advice from the Minnesota Attorney General, the State Canvassing Board accepted the Election Day returns. *See, e.g.,* Gelbmann/Jan.28/11:50; 2:40; 3:20-45; Reichert/Feb.26/11:50-55; 1:30-2:00.

As this Court recognized in its February Summary Judgment Order, under Minnesota law, where missing ballots cannot be found, election officials must turn to the next best evidence: here, the vote totals provided by election officials on Election Day. *See* Feb. 23 SJ Order at 22 (citing *Moon v. Harris*, 142 N.W. 12, 14 (Minn. 1913); *Schultz v. Shelp*, 155 N.W. 97, 98 (Minn. 1915); Opinion of the Attorney General). The Court declined to grant summary judgment on this issue because, at the time the summary judgment motion was made, there as a disputed issue of fact as to whether the ballots were actually missing. *See* Feb. 23 SJ Order at 23 (citing *McVeigh v. Spang*, 228 N.W. 155, 156 (Minn. 1929)). The Court noted that Contestants had submitted an affidavit suggesting that the ballots might not actually be missing and might be available as evidence. Feb. 23 SJ Order at 23 (citing Affidavit of John Rock ¶ 2).

On February 26, 2009, following lengthy testimony by Ms. Reichert, in which she unequivocally concluded that the ballots were missing, Contestants represented that they would not contest that the ballots were missing. *See* Friedberg/Feb.26/Approx. 1:30. Accordingly, Contestees are entitled to judgment on this claim. *See* Feb. 23 SJ Order at 22.<sup>7</sup>

**6. Absentee ballots opened on January 3, 2009 and on Election Day that should not have been opened (Paragraph 12(d), 12(e))**

In Paragraphs 12(d) and 12(e), Contestants alleged that some absentee ballots were improperly opened on January 3, 2009, pursuant to the agreed protocol among the parties, local officials, and the Secretary of State's Office, and that other ballots were improperly opened on Election Day.

Contestants' claim regarding the 933 ballots opened on January 3, 2009 has already been dismissed with prejudice. On February 3, 2009, the parties entered into a stipulation in which they agreed that those ballots were "properly and lawfully opened and counted," and the results were "properly and lawfully included in the results of the 2008 United States Senate election as certified by the Minnesota State Canvassing Board." Order Feb. 3, 2009. Accordingly, Contestants "dismiss[ed] with prejudice all claims in the Notice of Contest relating to the 933 Ballots." *Id.* The binding stipulation and Order of February 3, 2009 are dispositive of Contestants' claims regarding the 933 ballots. Order Denying Contestants' Motion for Temporary Injunction, Ct. File 62-CV-09-56, at 4 (Feb. 24, 2009).

Contestees are also entitled to judgment with respect to the absentee ballots opened on Election Day. This Court has repeatedly and unequivocally ruled that the scope of Contestants'

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<sup>7</sup> Furthermore, there is no evidence to suggest that the Election Day totals are in any way unreliable in this instance; rather, all evidence in the record supports the conclusion that they are an accurate count of the ballots cast. *See, e.g.,* Reichert/Feb.26/1:30.

challenge is limited to the approximately 4,800 ballots pleaded in their Notice of Contest.

Notwithstanding these court rulings, and after nearly five weeks of trial, Contestants, for the first time, made a sweeping, unprecedented request for this Court to reconsider "all absentee ballots previously counted in this election"—roughly 286,000 ballots—with the aim of un-counting some number of them or setting aside the election.

Contestants have had two months to identify absentee ballot envelopes that were accepted in error, and their conclusory assertions that some number of absentee ballot envelopes were improperly accepted fail to provide the specificity required by Minn. Stat. § 209.021 and 209.12, and fail to meet their clear pleading and evidentiary burden set forth by this Court's rulings. *See, e.g.*, Feb. 23 SJ Order, at 11, 13 n. 3; *see also supra* at 4-5. And they provided no interrogatory answer when asked to identify any such ballots.

But even assuming Contestants did not have a burden of pleading or proof on this point, or an obligation to disclose during discovery, until this Court's February 13, 2009 Order, they have utterly failed to meet those burdens: They have simply asked this Court to apply its Order to all ballots, without identifying the illegally cast ballots and identifying why precisely they fail to meet the statutory requirements. Under this Court's rulings and longstanding precedent, their claims fail as a matter of law. *Id.*

Moreover, as discussed in Contestee's previous filings, the Court lacks authority to take the steps Contestants urge. Overturning an election based on assumptions about how allegedly illegal votes were cast has never been accepted by any court in the State of Minnesota. Pointing only to *dicta* in a case that actually rejected proportional reduction, *Berg v. Veit*, 136 Minn. 443, 446-47 (1917), *see also Hanson v. Emanuel*, 210 Minn. 271, 280-81 (1941), Contestants offer no Minnesota authority in support of their position. In fact, Minnesota courts have long embraced

the fundamental principle that a successful election contest must be based on a showing that the election is clearly invalid. *See, e.g., Kearin v. Roach*, 381 N.W.2d 531, 533 (Minn. App. 1986); *Taylor v. Taylor*, 10 Minn. 107, 1865 WL 940, 3 (Minn. 1865).

Contestants' recent suggestion that the Court should set aside the election is wholly without support in law. As Contestants well know, "The only question that can be decided in an election contest is which party received the highest number of legally cast votes, and therefore is entitled to receive the certificate of election." Banaian Order at 3 (citing Minn. Stat. § 209.12). "The judge trying the proceedings shall make findings of fact and conclusions of law upon that question." Minn. Stat. § 209.12; *see also* Order on Contestee's Motion to Dismiss at 5. *See* Minn. Stat. § 209.12 (making clear that court lacks jurisdiction over questions "of deliberate, serious, and material violation of the provisions of the Minnesota election law" and that the court "shall make no findings or conclusion on those points").

To the extent Contestants believe that, in light of previous rulings, the Court is unable to fulfill its statutory duty to determine "which party received the highest number of legally cast votes and therefore is entitled to receive the certificate of election," their only recourse is the United States Senate. *See* Minn. Stat. § 209.12; *see also* U.S. Const., Art. I, § 5, Cl. 1 ("[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members."). Similarly, to the extent they are suggesting that there were systemic election irregularities in the election, the only place for resolution is the Senate. *See* Minn. Stat. § 209.12; Order on Contestee's Motion to Dismiss. Accordingly, this claim should be dismissed.

**7. Challenged ballots that were improperly rejected or accepted by the State Canvassing Board (Paragraphs 12(f) and 12(g))**

Contestants initially claimed that the State Canvassing Board somehow “inconsistently” but systematically rejected Coleman's challenges to ballots cast for Franken. Notice ¶ 12(f),(g). However, they have provided no evidence in support of this contention. Notably, Minnesota law provides one of the clearest and most comprehensive voter intent statutes in the country. *See* Minn. Stat. § 204C.22. During the course of its resolution of campaign challenges to ballots, the State Canvassing Board—made up of the Chief Justice and an Associate Justice of the Minnesota Supreme Court, the Chief and Assistant Chief Judge of the Second Judicial District, and the Secretary of State—thoughtfully and consistently applied Minn. Stat. § 204C.22 to each challenged ballot. Contestants offered no ballots or testimony suggesting a contrary conclusion. Accordingly, Contestees are entitled to judgment on Paragraphs 12(f) and (g).

**8. Ballots mutilated such that intent cannot be determined or ballots improperly rejected as defective or mutilated (Paragraphs 13 and 17)**

Contestants initially contended that ballots were mutilated, defaced, or obliterated such that the voter's intent could not be determined, or, alternatively, that ballots were improperly rejected as mutilated, defaced, or obliterated. Notice ¶¶ 13, 17. However, they have presented no evidence whatsoever in support of these claims. Accordingly, Contestees are entitled to judgment on them.

**9. Non-absentee voters failed to comply with all of requirements of Minnesota Election law (Paragraphs 14-16)**

In Paragraphs 14 through 16 of their Notice of Contest, Contestants claimed that some unspecified number of voters failed to comply with Minnesota Election Law. According to Contestants, unqualified and ineligible persons voted for Franken and some individuals voted more than once. With respect to non-absentee voters, Contestants have presented no evidence

whatsoever in support of these claims. Accordingly, Contestees are entitled to judgment on them. To the extent this claim encompasses absentee ballots alleged to be improperly accepted, it is addressed above in Sections II.C.2 and II.C.6.

**10. Election judges failed to initial ballots (Paragraph 18)**

In Paragraph 18 of their Notice of Contest, Contestants claimed that some election judges failed to initial ballots, but once again, they have presented no evidence whatsoever in support of this claim or any law to the effect that ballots not initialed should be voided. Accordingly, Contestees are entitled to judgment on this claim.

**11. Other unspecified errors by the State Canvassing Board (Paragraph 19)**

In Paragraph 19 of their Notice of Contest, Contestants asserted other unspecified errors by the State Canvassing Board. They have presented no evidence to support this vague assertion. Accordingly, Contestees are entitled to judgment on it.

**12. Errors by Local Canvassing Boards (Paragraph 20)**

In Paragraph 20 of their Notice of Contest, Contestants alleged that local canvassing boards committed errors. They have presented no evidence to support this vague assertion. Accordingly, Contestees are entitled to judgment on it.

**13. Equal Protection Claims**

Finally, it is worth noting that although Contestants have repeatedly invoked the Equal Protection Clause of the United States, they did not plead an Equal Protection claim in their Notice. For the reasons discussed in Contestee's previous filings, any such claim is both

procedurally barred and fails on the merits. *See, e.g.*, Contestee's Memorandum of Law in Opposition to Contestants' Motion for Summary Judgment (filed 1/22/09); Contestee's Memorandum of Law in Opposition to Offer of Proof (filed 2/18/09); Contestee's Memorandum of Law in Opposition to Contestants' Motion for Ruling Applying Feb 13, 2009 Order to Previously Counted Absentee Ballots (filed 2/25/09); *see also* Order on Contestants' Motion for Summary Judgment, Ct. File No. 62-CV-09-05, at 7 (Feb. 3, 2009) ("Feb. 3 SJ Order").

First, the claim is procedurally barred because Contestants failed to provide the notice or evidentiary support that would have been required for their Equal Protection claim to succeed. *See* Order on Contestee's Motion in Limine, at 4-5.

Second, as this Court correctly observed, the 2008 election in Minnesota for United States Senator was quite "[u]nlike the situation presented in Florida in *Bush v. Gore*." Unlike in Florida, "the Minnesota Legislature has enacted a standard clearly and unambiguously enumerating the grounds upon which an absentee ballot may be accepted or rejected." Feb. 3 SJ Order at 7. *See also, e.g.*, Minn. Stat. §§ 203B.12, 203B.08, 203B.07, 203B.04, 201.071; Minn. R. 8210.0500, 8210.0600; Banaian Order at 3. Contestants contend that errors in the application of Minnesota's uniform standard constitute a constitutional violation. Not only would this result in an untenable rule that would make democratic and federalist government impossible; it finds no support in the case law. Rather, courts have consistently refused to find constitutional violations due to errors or inconsistencies, where clear state standards exist. *See, e.g., Graham v. Reid*, 779 N.E.2d 391, 395 (Ill. App. Ct. 2002); *Griffin v. Burns*, 570 F.2d 1065, 1076-1079 (1st Cir. 1978); *Rossello-Gonzalez v. Calderon-Serra*, 398 F.3d 1, 14 (1st Cir. 2004); *Duncan v. Poythress*, 657 F.2d 691, 701-704 (5th Cir. 1981); *Pettengill v. Putnam County R-I School Dist.*,

*Unionville, Mo.*, 472 F.2d 121, 122 (8th Cir. 1973); *Welker v. Clarke*, 239 F.3d 596, 597 n.3 (3d Cir. 2001); *see also Purcell v. Gonzalez*, 549 U.S. 1 (2006) (reiterating earlier warnings that courts should be hesitant to interfere with voting procedures on federal constitutional grounds).

Furthermore, the Equal Protection Clause certainly does not constitutionalize every error and inconsistency in an election with respect to the conditions and procedures imposed upon voting by absentee ballot, which receives less constitutional protection than does voting at the polls. *See* Feb. 3 SJ Order at 5 (“[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.”) (quoting *Erlandson v. Kiffmeyer*, 659 N.W.2d 733, n. 8 (Minn. 2003)); *see also* Feb. 23 SJ Order at 6.

### CONCLUSION

Contestants have failed to demonstrate a right to relief on any of their claims. This Court should dismiss this action and grant judgment for Contestee on all of the claims, or, in the alternative, on some portion of Contestants' claims.

Dated: March 5, 2009.

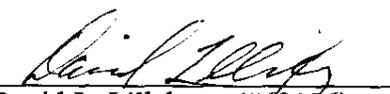
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**ACKNOWLEDGMENT**

Contestee acknowledges that sanctions may be imposed under Minn. Stat. § 549.211.

  
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