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Court Administrator

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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,
Cullen Sheehan and Norm Coleman,

Court File No. 62-CV-09-56

MEMORANDUM OF LAW

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.

INTRODUCTION

Contestant Norm Coleman ("Contestant") respectfully petitions the Court for certification of a class consisting of thousands of voters who submitted absentee ballots in the November 4, 2008, general election, all of whom are similarly situated because they pre-registered to vote or had included their voter registration form within their absentee ballot envelope, were alive on election day, and did not otherwise vote.

BACKGROUND

Petitioners are 64 absentee voters who believe that their ballots were wrongfully excluded by local election officials. Each of the 64 were alive on election day, were either pre-registered or included a registration with their ballot, and did not otherwise vote. The relief sought is to have the Court open the ballots and count them.

There are thousands of similarly situated absentee voters who also were denied a franchise for identical or substantially identical reasons, or non reasons, as the 64 petitioners. They also were alive on election day, were either pre-registered or included a registration, and did not otherwise vote.

The additional thousands clearly desire the same relief, i.e. having their ballot opened and counted.

Equal Protection of the law demands equal treatment. Extending the relief that contestant should be granted (provisionally) to the 64, to all others similarly situated through certification of a class achieves the constitutionally mandated goal. Testimony or affidavits are not needed. The outside of the envelopes will speak for themselves.

ARGUMENT

Certification of a class consisting of thousands of Absentee Voters is proper under the rules and clearly appropriate in this case. The Minnesota Rule governing class actions specifically state that “[o]ne or more members of a class may sue or be sued as representative parties on behalf of all.” Minn. R. Civ. P. 23.01. So-called “reverse” class actions are clearly contemplated by Rule 23.01 and appropriate when individuals have been left out of a class. *See Streich v. Am. Fam. Mut. Ins. Co.*, 399 N.W.2d 210, 214

(Minn. Ct. App. 1987); *Rexam Inc. v. United Steel Workers of Am., AFL-CIO-CLC*, 2005 WL 1260914 (D. Minn. 2005) (discussing reverse class action for defendant class certification); *City of Rochester v. Chiarella*, 467 N.Y.S.2d 948, 955 (N.Y. Sup. Ct. 1983). Where, as here, the a case involves matters of public interest, reverse class action certification is appropriate. See *Williams v. State Bd. of Elections*, 696 F. Supp. 1574, 1581 (N.D. Ill. 1988) (certifying reverse class action for joinder of candidates in judicial elections); *City of Rochester*, 467 N.Y.S.2d at 955 (anticipating flood of litigation, city commenced reverse class action on behalf of taxpayers who paid unconstitutional taxes and court held that taxes were paid voluntarily and not under protest and denied recovery), *affirmed by Rochester v. Chiarella*, 472 N.E.2d 46 (N.Y.1984).

Courts have considerable discretionary power to determine whether class actions may be maintained. *E.g., Forcier v. State Farm Mut. Auto. Ins. Co.*, 310 N.W.2d 124, 130 (Minn. 1981). To maintain a class action in Minnesota, four prerequisites must first be satisfied. Minn. R. Civ. P. 23.01; *Streich*, 399 N.W.2d at 214. These prerequisites are referred to as numerosity, commonality, typicality, and representivity. *Id.* Specifically, class certification is appropriate if:

- (a) the class is so numerous that joinder of all members is impracticable;
- (b) there are questions of law or fact common to the class; (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (d) the representative parties will fairly and adequately protect the interests of the class.

Minn. R. Civ. P. 23.01.

In addition to satisfying the prerequisites, the action must fall within one of three categories described in Minn. R. Civ. P. 23.02. Because the Absentee Voters (hereafter

the “Class”) meet the class certification requirements under both Rule 23.01 and 23.02, the Class should be certified and permitted to proceed in this action as intervening petitioners.

A. The Class Meets The Numerosity, Commonality, Typicality And Representativity Requirements of Rule 23.01.

The Class at issue here clearly satisfies the four prerequisites enumerated in Minn. R. Civ. P. 23.01. Each is addressed in turn.

1. Numerosity

Numerosity is satisfied here because joinder of each Absentee Voter, while theoretically feasible, is wholly impracticable. *See Jenson v. Continental Fin. Corp.*, 404 F. Supp. 806, 809 (D. Minn. 1975). The Absentee Voters are clearly numerous—the numbers are in the thousands. Furthermore, the Absentee Voters are scattered throughout the state of Minnesota and, because they voted with absentee ballots, likely located outside the state or even the country. The geographical dispersion of the Absentee Voters makes individual joinder even more impracticable. Accordingly, the Class satisfies the numerosity requirement of Rule 23.01.

2. Commonality

“Commonality requires that there be questions of law or fact common to the class.” *Streich*, 399 N.W.2d at 214. In other words, the question must be a “common issue the resolution of which will advance the litigation.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623, 117 S. Ct. 2231 (1997). “The threshold for commonality is not high and requires only that the resolution of the common questions affect all or a

substantial number of class members.” *Streich*, 399 N.W.2d at 214. “When the claim arises out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment.” *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 831 (8th Cir.1977), *cert. denied*, 434 U.S. 856 (1977).

Here, the commonality requirement is easily met. Each Absentee Voter had their absentee ballot wrongfully rejected and will argue they be considered as being compliant with or substantially compliant with the law. Exactly the claims made by the 64 petitioners. Thus, the Class has met the prerequisite of commonality under the rules.

3. **Typicality and Representivity**

The remaining prerequisites are often viewed as a two-pronged approach “intended to insure that the claims of the class members are fully presented and vigorously prosecuted.” *Streich*, 399 N.W.2d at 214 (citation omitted). Typicality focuses on the representative parties and looks to whether the parties “have an interest compatible with that of the class sought to be represented.” *Id.* Similarly, representivity means the representative parties’ interests must coincide with the interests of other class members. *Id.* The Court should determine the proper class representative(s) and class counsel under Rule 23.

Because the four class-certification prerequisites of numerosity, commonality, typicality and representivity have been satisfied, the Court must next determine whether it meets the standard set forth in Rule 23.01. *Id.*

B. The Class Meets The Requirements of Rule 23.01.

An action may be maintained as a class action if the prerequisites of Minnesota Rules of Civil Procedure 23.01 are satisfied, and in addition:

(a) the prosecution of separate actions by or against individual members of the class would create a risk of (1) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (2) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or (b) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (c) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action.

Minn. R. Civ. P. 23.02(3); see *In re Obj. and Def to Real Prop. Taxes for 1980 Ass.*, 335 N.W.2d 717, 718 (Minn. 1983). In other words, the question is whether a class action is superior to other methods of adjudication. *In re Obj. and Def to Real Prop. Taxes for 1980 Ass.*, 335 N.W.2d at 718. Factors to consider include manageability, fairness, efficiency, and available alternatives. *Id.*

Here, a class action is clearly favorable and in the interest of judicial efficiency and manageability. Most importantly, however, without a class action, an individual Absentee Voter's claim will likely go undecided, either because the individuals are

unaware they are entitled to a determination or because the claim is so small as to make individual litigation prohibitively expensive. Each Class member was pre-registered to vote or had included their voter registration form within their absentee envelope, was alive on election day, and did not otherwise vote, as were Petitioners. In the interest of fundamental fairness and equal protection, therefore, it is imperative that similarly situated Absentee Voters be treated similarly and that this Court grant class certification.

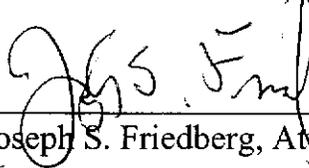
CONCLUSION

For the foregoing reasons, Contestant respectfully requests that this Court grant Contestant's request for the certification of a class of intervening petitioners consisting of thousands of voters who submitted absentee ballots in the November 4, 2008, general election, all of whom are similarly situated because they pre-registered to vote or had included their voter registration form within their absentee envelope, were alive on election day, and did not otherwise vote, therefore they are entitled to protection equal to that of the 64 initial petitioners under the law.

Dated: January 03, 2009
CHARTERED

Respectfully submitted,

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