

STATE OF MINNESOTA

OFFICE OF
APPELLATE COURTS

DISTRICT COURT

COUNTY OF RAMSEY

JAN 13 2009

SECOND JUDICIAL DISTRICT

FILED

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,

**CONTESTEE'S ANSWER
AND COUNTERCLAIMS**

v.

Al Franken,

Contestee.

INTRODUCTION

Contestee, Al Franken ("Franken"), certified as having been chosen as United States Senator by the people of Minnesota in the November 4, 2008, election ("Election"), files this Answer to the Notice of Contest ("Notice") filed by Contestees Norm Coleman and Cullen Sheehan (collectively, "Coleman").

The Court lacks jurisdiction to consider the Notice, but even if it had jurisdiction it is only for the limited purpose of either conducting a re-count of the universe of ballots accepted by the State Canvassing Board or acting as an unappointed agent of the United States Senate to take and preserve evidence of irregularities affecting that universe of ballots. Coleman does not properly invoke either possibly constitutional role for the Court. He does not specifically allege a single error of determining voter intent or of counting that could be addressed in a re-count, much less sufficient errors to put Franken's margin of victory in question. As to the numerous

irregularities Coleman alleges, he does not invoke the only possibly available remedy in this Court, taking and preserving of evidence for an election contest in the United States Senate that he still has not filed there.

Instead, in his Notice, Coleman mixes specific and general allegations of irregularities with his request for a re-count, thereby seeking improperly to blur the distinction between that which Minnesota law commits to this Court and that which it reserves for exclusive determination by the United States Senate. The systematic deficiencies in the Notice—including Coleman’s requests for this Court to exceed its power under Minn. Stat. § 209.12—are further addressed in Franken’s separate Motion to Dismiss and memorandum in support thereof, which address the issues of subject matter jurisdiction and failure to state a claim. The Motion to Dismiss and supporting memorandum are incorporated herein to the extent necessary to avoid any issue of waiver.

Moreover, Coleman advances previously rejected and still-unsupported arguments, seeks to disenfranchise numerous Minnesotans who cast lawful ballots, and asks the Court to count hundreds of invalidly cast ballots. As every administrative and judicial body that has examined these contentions has determined, Coleman’s allegations are baseless. To try to supplement his oft-rejected arguments, he offers a new litany of vague, conclusory, and often incomprehensible complaints about every facet of the Election, canvassing, and recount. By casting unspecified and unjustified aspersions on Minnesota’s election system in the hope that this process will uncover some previously unknown irregularity, Coleman impugns the integrity and competence of election officials who have spent thousands of hours ensuring that every lawfully cast vote was counted.

Franken affirmatively states that—as unanimously and accurately determined by the State Canvassing Board in the Certificate incorporated into Coleman's Notice as Exhibit A—Franken, and not Coleman, was chosen by the plurality of votes lawfully cast in the General Election. In this Answer, Franken responds to the allegations in Coleman's Notice to the degree possible, a task made arduous or impossible by Coleman's refusal or inability to identify in the Notice and within the seven day period what, precisely, it is that he thinks will overturn the judgment of the State Canvassing Board or where there were mistakes in counting the votes. To the extent that any allegation in the Notice is not expressly admitted, it is denied.

Franken also affirmatively states that certain ballots lawfully cast for him have not yet been counted due to irregularities. Other ballots were improperly included in the Board's final certification of the number of ballots cast for Coleman. In each instance, with respect to issues raised by Franken, the State Canvassing Board or local election officials were determined to lack the authority to address the irregularities and adjust the ballot count. The same limited authority applies to adjusting the universe of ballots in any court-operated recount.

Accordingly, Franken asks the Court under Minn. Stat. § 209.12 to take and preserve evidence on the counterclaims he has set forth below. Should the United States Senate chose to do so, it then could adjudicate Franken's counterclaims and increase his margin of victory accordingly. Franken further makes a conditional request that this Court resolve the irregularity-related issues raised in his counterclaims. This request should be granted, Franken respectfully submits, only if the Court concludes it that it has jurisdiction to resolve irregularity-related claims raised by Coleman.

ANSWER

1. As to Paragraph 1 of the Notice, Franken is without information as to whether contestant Cullen Sheehan (“Sheehan”), Coleman's campaign manager who came from Iowa for that purpose, is a Minnesota resident qualified as an eligible voter under Minnesota election law or as to whether he cast an absentee ballot in the Election. Franken denies Sheehan’s allegations that the State Canvassing Board erroneously declared that Franken received the plurality of votes lawfully cast in the Election.

2. As to Paragraph 2 of the Notice, Franken admits that Coleman is a Minnesota resident, eligible to vote under Minnesota election law, who was a United States Senator from the State of Minnesota until his term expired on Saturday, January 3, 2009. Franken admits that Coleman voted in the General Election. Franken denies Coleman’s allegations that the State Canvassing Board erroneously declared that Franken received the plurality of votes lawfully cast in the Election. Franken admits that Coleman’s name appeared on the official ballot as a candidate for the office of United States Senator in all counties within the State of Minnesota.

3. As to Paragraph 3 of the Notice, Franken admits that his name appeared on the official ballot as a candidate for the office of United States Senator in all counties within the State of Minnesota.

4. As to Paragraph 4 of the Notice, Franken admits the allegations.

5. As to Paragraph 5 of the Notice, Franken objects to Coleman’s effort to define “ballot,” which is defined by provisions of Minnesota and federal election law. To the extent Coleman's definition attempts to disenfranchise Minnesotans by excluding ballots lawfully cast, but which could not be run through voting machines on Election Day, Franken objects.

6. As to Paragraph 6 of the Notice, Franken admits that Coleman apparently uses the term "Election Materials" within his Notice to refer to the materials described in this paragraph of his Notice.

7. As to Paragraph 7 of the Notice, Franken admits the allegations.

8. As to Paragraph 8 of the Notice, Franken admits that the State Canvassing Board determined that he received 1,212,431 votes in contrast to Coleman's 1,212,206 votes and signed a Certificate attesting to these results. Franken further admits that, consistent with the transparency with which the Secretary of State and State Canvassing Board have carried out their duties, the vote totals and certificate were quickly posted to the Secretary of State's website. Franken denies that the Board erroneously concluded that he received the plurality of votes lawfully cast in the election.

9. As to Paragraph 9 of the Notice, Franken denies the allegations. Specifically, Franken denies that any unidentified "errors, mistakes and other irregularities," including "matters and things," took place or affected the outcome of the Election. Coleman's Notice provides absolutely no basis for Franken to identify or respond to the unspecified issues asserted in Paragraph 9 and fails to identify any particular ballots (among the 2.9 million cast), precincts, or even counties at issue. Minn. Stat. § 209.12 precludes the Court from making any findings or conclusions with respect to allegations of "errors, mistakes and other irregularities" (or similar "matters and things") and thus precludes addressing those in the re-counting sought by Coleman. Moreover, as further set forward in Franken's Affirmative Defenses, every material rule and recount procedure adopted by the State Canvassing Board or promulgated by the Secretary of State was formulated with Coleman's input and consent, and often at Coleman's

request or demand, and Coleman demanded that many of these rules and procedures be followed during the recount until it became expedient for him to repudiate his prior agreements.

10. As to Paragraph 10 of the Notice, Franken objects to Coleman's use of the phrase "By way of example only" as an illegitimate attempt to hide until later allegations of improperly rejected absentee ballot envelopes and to do so in violation of the seven-day limit and specificity requirements of Minn. Stat. § 209.021 and 209.12. Trial must commence no more than 20 days after the Notice was filed. The ballot envelopes in question were received by county election officials over two months ago. A complete list of rejected absentee ballot envelopes has been available for nearly as long. Minn. Stat. § 209.12 precludes the Court from making any findings or conclusions with respect to allegations of wrongfully and erroneously excluded ballots and thus precludes addressing such allegations in the re-counting sought by Coleman. In contrast to the current allegations in Paragraph 10, Coleman was careful, in his briefing to the Minnesota Supreme Court on this issue, to note that he *did not know* if these ballots were improperly rejected. *See e.g.*, Exhibit A (Dec. 31, 2008, Motion for Emergency Order), at 3 ("the Coleman campaign was able to identify approximately 650 such ballots *that appear on their face to raise a question as to whether the ballots were properly rejected*") (emphasis added). Pursuant to a December 18, 2008, order of the Minnesota Supreme Court and a Protocol jointly created by Coleman, Franken, the Secretary of State, and local election officials, local election officials identified 1,346 ballots that were wrongfully rejected on Election Day for a reason other than the four exclusive statutory reasons set forth in Minn. Stat. § 203B.12. In the course of their re-review of rejected absentee ballots, each of the 654 ballots was again rejected as invalidly cast. Coleman submitted this list of ballots after the Protocol's deadline for doing so had passed. Franken admits that his campaign objected to the untimely submittal of these ballots, as often did

the involved local election officials, and that he refused to agree to the untimely submittal of ballots identified by Coleman in the absence of any evidence that they were legally cast. Franken therefore admits that these ballots were not opened and counted by the Secretary of State on January 3, 2009. The only common thread among these 654 ballots was that they were cast in areas which favored Coleman. For example, 94 are from Dakota County, which Coleman won by 8%, and 64 are from the City of Plymouth, which Coleman won by 12%. Outer jurisdictions where Coleman won by more than 20% are heavily represented: 32 from Scott County; 31 from Carver County; 23 from Sherburne County; and 15 from Wright County. Finally, Franken admits that the Minnesota Supreme Court rejected Coleman's complaint that the Protocol, which required the agreement of all parties before a ballot was counted, did not result in all ballots being counted (or left uncounted) precisely how he wished.

11. As to Paragraph 11 of the Notice, Franken objects to Coleman's allegations that "[o]n information and belief" unspecified absentee ballots were irregularly rejected by local election officials as an illegitimate attempt to reserve the right to raise further allegations of irregularly rejected absentee ballot envelopes without setting forth the specific grounds of this contest within seven days as required by Minn. Stat. § 209.021 and 209.12. Minn. Stat. § 209.12 precludes the Court from making any findings or conclusions with respect to allegations of irregularities with respect to excluded ballots and thus precludes addressing those in the re-counting sought by Coleman. Franken denies that the envelopes identified by Coleman in Exhibit B-1 were erroneously rejected by local election officials. Franken further denies that certain envelopes identified by Coleman in Exhibit B-1 were excluded from the vote totals certified by the Board. The absentee ballot envelope of Trina Funches, included in Group A of Exhibit B-1, was included on the list of 1,346 wrongfully rejected ballots identified by local

election officials. Neither Coleman nor Franken objected to its inclusion in the recount, and so this ballot has already been counted.

12. As to Paragraph 12 of the Notice, Franken objects to Coleman's use of the phrase "By way of example only" for the reasons identified in Franken's answer to paragraphs 10. Minn. Stat. § 209.12 precludes the Court from making any findings or conclusions with respect to allegations of irregularities in Paragraph 12 and thus precludes addressing those in the re-counting sought by Coleman. Franken denies the allegations of this paragraph, and specifically objects and states as follows:

(a) Franken denies that Minn. Stat. § 206.86 has any bearing on a manual recount conducted pursuant to Minn. Stat. 204C.35 and Minn. R. 8235 et seq. or an election contest under Minn. Stat. § 209.12, and he further denies that any irregular double-counting occurred in the precincts identified in Exhibit C. The very essence of a recount—the determination of the voter's intent and the existence of disqualifying distinguishing marks—could not be fulfilled by examining a duplicate ballot that was filled out by an election judge interpreting a voter's intent. Franken admits that Coleman's petition to the Minnesota Supreme Court regarding duplicate ballots was unanimously rejected, in part because of his inability to present a single instance of double-counting. Franken objects to Coleman's effort to reserve the right to raise further allegations of irregularly-handled duplicate ballots in further unspecified counties. Finally, and for the reasons stated in Franken's affirmative defenses below, Coleman is estopped from challenging the inclusion of unmatched original ballots in the recount because he himself proposed that such ballots should be counted, the Secretary of State and Franken agreed that this approach was consistent with Minnesota law, and the entire recount was carried out utilizing the procedure to which all parties agreed.

(b) Franken denies the allegations of Paragraph 12(b) of the Notice. Franken objects to Coleman's effort to reserve the right to raise additional irregularities with respect to unspecified ballots in unspecified precincts. Franken denies that unspecified "chain of custody" irregularities mandate the disenfranchisement of voters in Maplewood Precinct 6 and Saint Paul Ward 3, Precinct 9. Franken further states the following:

- In Maplewood Precinct 6, 171 ballots were lawfully cast, but never counted, on Election Day. Franken denies any allegation that these ballots were counted in error. On Election Day, a broken ballot counter was swapped for one in working order. By then, 171 people had voted and their ballots had been placed into the ballot box. Because election officials failed to promptly re-feed the 171 ballots through the new ballot counter, the votes were not counted on the tape. Instead, the ballots remained in the ballot box, and then in secured transfer cases, until they were discovered by recount officials at the Ramsey County recount site. Local election officials have uniformly stated that all the ballots were properly cast and securely protected until their discovery during the recount. In the same precinct, the recount initially found a discrepancy between the numbers of votes cast (1,564) and the number of voters as identified by election judges on Election Day (1,533). A subsequent investigation determined that election judges had failed to record, on the voting rolls, the names of 31 absentee voters who had properly sent in their registration cards. Franken denies any allegation of irregularity as to these ballots.
- In Saint Paul Ward 3, Precinct 9, late on Election Day, election judges experienced problems where absentee ballots were getting jammed in the ballot counter before they could be counted. The judges dropped the ballots in question into the ballot

box. Local election officials have uniformly stated that these technical difficulties resulted in the summary statement tape omitting lawfully cast ballots from the Election Day totals. Franken denies any allegation of irregularity as to these ballots.

(c) Franken denies the allegations of paragraph 12(c). In Minneapolis Ward 3 Precinct 1, 2,028 ballots were cast on Election Day, but only 1,896 ballots initially were found during the recount. Election officials found five 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 testified to the Board that there was simply no doubt that the ballots had been cast, counted, and then lost. Minnesota law is equally clear that 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. Franken denies that Coleman’s relentless effort to disenfranchise the voters who cast these ballots has any factual or legal validity.

(d) Franken denies the allegations of Paragraph 12(d) of the Notice except as stated and objects that these and other allegations are barred by laches and estoppel for the reasons set forth in Franken’s Affirmative Defenses. Franken admits that the counties of Hennepin and Ramsey determined that five persons whose ballots had initially been identified as wrongfully rejected had voted in person on Election Day and that these voters’ absentee ballots were duly removed from the list.

(e) Franken cannot meaningfully and intelligently respond to the allegations of Paragraph 12(e) of the Notice because Coleman has identified no absentee ballot envelopes that were irregularly accepted by election officials on Election Day, and therefore denies the same.¹

¹ Coleman’s allegation that envelopes were accepted that did not comply with the requirements of Minn. Stat. § 203B.13 presumably sought to reference Minn. Stat. § 203B.12. Minn. Stat. §203B.13 governs the establishment,

Coleman has had two months to identify absentee ballot envelopes that were accepted in error, and his conclusory and bare speculation that some absentee ballot envelopes were accepted in error fails to provide the specificity within seven days required by Minn. Stat. § 209.021 and 209.12.

(f) Franken cannot meaningfully and intelligently respond to the allegations of Paragraph 12(f) of the Notice because Coleman fails to identify a single ballot that he believes was irregularly rejected, and therefore denies the same. Franken denies the allegations of paragraph 12(f), and further notes that 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. Coleman cannot seriously maintain that the Board somehow “inconsistently” but systematically rejected Coleman challenges to ballots cast for Franken.

(g) Franken objects to Coleman’s bare and conclusory allegations regarding unspecified successful Franken ballot challenges that were irregularly accepted by the Board and denies the allegations of Paragraph 12(g) of the Notice for the reasons stated in his answer to the allegations contained in Paragraph 12(f).

13. As to Paragraph 13 of the Notice, Franken cannot meaningfully and intelligently respond to the allegations because Coleman fails to identify any ballots that were mutilated, defaced, or obliterated such that the voter’s intent could not be determined. Franken denies the

duties, and compensation of absentee ballot boards and does not set forward requirements governing the acceptance of absentee ballots.

allegations for the reasons stated in his answer to the allegations contained in Paragraph 12(f). To the extent that Paragraph 13 encompasses ballots that Coleman did not challenge during the recount, and as set forth in Franken's Affirmative Defenses, laches bars him from challenging such ballots. To the extent it encompasses ballots he did challenge, he has not identified any irregularity in the resolution of such challenges. Minn. Stat. § 209.12 precludes the Court from making any findings or conclusions with respect to allegations of irregularities with respect to counting ballots in poor condition and thus precludes addressing those in the re-counting sought by Coleman.

14. As to Paragraph 14 of the Notice, Franken cannot adequately and intelligently respond to the allegations and therefore denies the same. Coleman does not identify a single voter who he claims did not comply with the requirements of the "Minnesota Election Law" and nonetheless had his or her vote counted. Coleman does not even identify which provision of the "Minnesota Election Law" is at issue. Coleman does not allege or even hint why these unspecified irregularities by unspecified voters require the disenfranchisement of such voters. To the extent that Coleman alleges that the unspecified voters at issue engaged in unspecified fraud or other irregularities, the Court lacks jurisdiction under Minn. Stat. § 209.12 to make any findings or conclusions with respect to such allegations or to take those into account in the re-counting sought by Coleman.

15. As to Paragraph 15 of the Notice, Franken cannot adequately and intelligently respond to the allegations and therefore denies the same. Coleman does not identify a single "unqualified and ineligible" voter who he claims cast a vote that was counted for Franken. Coleman does not identify the provision of the "Minnesota Election Law" which rendered these voters "unqualified and ineligible." To the extent that Coleman alleges that the unspecified

voters at issue engaged in unspecified fraud or other irregularities, the Court lacks jurisdiction under Minn. Stat. § 209.12 to make any findings or conclusions with respect to such allegations or to take those into account in the re-counting sought by Coleman.

16. As to Paragraph 16 of the Notice, Franken cannot adequately and intelligently respond to the allegations and therefore denies the same. Coleman does not identify a single voter who voted more than once. Coleman does not identify a precinct or even county where any voter cast more than one ballot, election officials counted both ballots, and the Board certified the result. To the extent that Coleman alleges that the unspecified voters at issue engaged in election fraud or other irregularity, the Court lacks jurisdiction under Minn. Stat. § 209.12 to make any findings or conclusions with respect to such allegations or to take those into account in the re-counting sought by Coleman.

17. As to Paragraph 17 of the Notice, Franken denies the allegations for the reasons stated in his answer to Paragraph 12(f). Franken further denies that certain unspecified ballots challenged by Coleman were irregularly rejected by the Board on the grounds that they contained distinguishing marks or unclear expressions of voter intent. Minn. Stat. § 209.12 precludes the Court from making any findings or conclusions with respect to allegations of irregularities with respect to rejecting ballots and thus precludes addressing those in the re-counting sought by Coleman.

18. As to Paragraph 18 of the Notice, Franken denies that Coleman's troubling insinuations have any bearing on the outcome of the Election whatsoever. Coleman's suggestion that a voter should be disenfranchised because an election judge committed the minor irregularity of failing to initial the backs of the ballot is cavalierly dismissive of the fundamental right to vote and profoundly at odds with Minnesota law, which is properly clear that innocent

voters should not be disenfranchised because of irregularities, ignorance, inadvertence, or mistake on the part of election officials. Minn. Stat. § 209.12 precludes the Court from making any findings or conclusions with respect to allegations of irregularities such as initialing and thus precludes addressing those in the re-counting sought by Coleman.

19. As to Paragraph 19 of the Notice, to the extent that it alleges that the Board failed to detect and correct obvious errors that are not identified in his Notice, Franken objects to Coleman's failure to adequately set forward the grounds on which his contest will be made so that Franken can meaningfully respond. With respect to Coleman's claim that the Board failed to correct the "obvious errors" described within ¶ 11, Franken notes that the Minnesota Supreme Court held on December 18, 2008, that "improper rejection of an absentee ballot envelopes is not within the scope of errors subject to correction . . . and therefore county canvassing boards lack statutory authority to count such ballots and submitted amended reports on that basis." Exhibit B (Dec. 18, 2008, Order), at 2. Even if an error had occurred in the manner suggested in this paragraph, it would be an irregularity that cannot be determined by the Court or considered in the re-counting. Franken denies the other allegations of Paragraph 19 for the reasons set forth in his answer to the allegations of paragraphs 12-17. Again, even if an error had occurred in the manner suggested in this paragraph, Minn. Stat. § 209.12 precludes the Court from making any findings or conclusions with respect to allegations of irregularities in the Board's process and decisions and thus precludes addressing those in the re-counting sought by Coleman.

20. As to Paragraph 20 of the Notice, Franken objects to the allegations insofar as Coleman fails to identify even what manner of "obvious errors" were allegedly undetected and uncorrected by local canvassing boards during the initial canvass, let alone any *specific* errors which were made. Even if an error had occurred in the manner suggested in this paragraph,

Minn. Stat. § 209.12 precludes the Court from making any findings or conclusions with respect to allegations of irregularities with respect to the process or decisions of local canvassing boards and thus precludes addressing those in the re-counting sought by Coleman.

21. As to Paragraph 21 of the Notice, it contains legal conclusions and requires no response. Errors, violations of law, and other irregularities during the Election and recount did not result in Franken's receiving more votes than Coleman. Franken won because more voters cast lawful ballots for him.

22. Franken denies that Coleman has any need to inspect ballots to prepare his case for trial. The Coleman campaign has viewed each of the 2.9 million ballots cast in this election during the course of the recount and has no conceivable need to reinspect ballots. Franken denies that Coleman has any need to inspect election materials for the reasons stated in his answer to paragraph 23.

23. Franken objects to Coleman's request to inspect ballots as premature. Until the court rules on Franken's motion to dismiss Coleman's allegations, Coleman's need to inspect election materials from particular precincts, or to take discovery, cannot be determined. This Court should limit inspections to only those election materials that may be relevant to this election contest, and should do so after making its ruling as to the sufficiency of Coleman's claims.

24. Franken denies that yet another recount is required. The State of Minnesota has already recounted 2.9 million ballots cast in the General Election. This process cost the State of Minnesota at least \$200,000 and lasted well over a month. Ballots contested by either campaign were examined and resolved by the State Canvassing Board. At this point, all ballots in the State of Minnesota have been counted at least twice. Those challenged before the State Canvassing

Board have been counted at least three times. Franken also objects to Coleman's request for the court to order a recount in only certain precincts. This request invites the court to authorize manifest constitutional error by authorizing a recanvass of some—but not all—precincts and applying new rules to only those recanvassed ballots.

AFFIRMATIVE DEFENSES

Subject Matter Jurisdiction

1. The court lacks subject matter jurisdiction.

Constitutionality of the Procedures and Relief Sought

2. The procedures and relief sought by Coleman violate Article 1, Sections 5, of the United States Constitution.
3. Coleman's request to re-recount only precincts that he selects violates equal protection under the Minnesota and United States Constitutions.

Estoppel, Laches, and Unclean Hands—Procedures Governing Recount of Original/Duplicate Ballots

4. The fundamental and sole objective of a recount is to ascertain the number of “votes validly cast” for each candidate. Minn. Stat. § 204C.35, subd. 3. A ballot is valid if the voter's intent is determinable. Minn. Stat. § 204C.22, subd. 1. Where a duplicate of a ballot was created under Minn. Stat. § 206.86, the fundamental necessity of determining voter intent from the original ballots was recognized by all parties at the commencement of the recount process. During a telephone conference convened by the Secretary of State's office with both campaigns to establish rules for the recount, Coleman proposed that original ballots be counted. Franken agreed.
5. In reliance on the parties' agreement, on November 17, 2008, the Secretary of State's Office issued revised proposed rules for the recount. The rules were adopted by the State

Canvassing Board on Tuesday, November 18, 2008, and, because the Board adopted Coleman's position, there was no objection from Coleman. Rule 9 provides as follows:

As the Table Official sorts the ballots, he or she shall remove all ballots that are marked as duplicate ballots and place those duplicate ballots in a fourth pile. At the conclusion of the sorting process, the Table Official shall open the envelope of original ballots for which duplicates were made for that precinct and sort the original ballots in the same manner as they sorted all other ballots. The Table Official shall disregard this step if there is not an envelope of original ballots, in which case the duplicate ballots will be sorted.

Later, the Secretary of State made it even more clear to county election officials that they were to tabulate original ballots rather than duplicates during the recount whenever possible. This directive stated as follows:

- * If no ballots marked as duplicates, no reason to go to Original Envelope, there is no way to pull out duplicates to replace with originals.
- * If ballots are marked as duplicated, pull out duplicates, not matched to originals, just sort and count the originals.
- * If obvious difference between number of duplicates & originals, discuss with candidate representatives, noting decision if counted duplicates or originals on the incident log.

Before sending this directive, Deputy Secretary of State Jim Gelbmann distributed it to both campaigns, explaining, "This will go to all election officials later today. Call or e-mail if you have concerns." In addition, Deputy Secretary Gelbmann explained:

It is the opinion of our Office that Rule 9 is clear about the process to be used when duplicate ballots are found during the sorting process. Those ballots are to be removed from the sorting process and placed in a separate (sic) pile. If there is an envelope of original ballots, the original ballots should then be sorted. If there are no duplicate ballots found during the sorting process, the canvass board has not authorized the envelope of original ballots to be opened and the original ballots envelope should remain sealed. If no envelope of original ballots exist, the duplicate ballots should then be sorted. While there is no requirement to compare the number of duplicate ballots to the number of original ballots, if there is an apparent significant discrepancy in the numbers, the candidates' representatives should attempt to agree on whether to sort the original or duplicate ballots. The Deputy recount official shall note on the incident log if the duplicates rather than

original ballots were counted. If the two candidate representatives can not agree, the Deputy Recount Official shall sort and count the original (sic) ballots.

Coleman did not object. Indeed, instead of objecting, Coleman's authorized representative responded that this "was perfectly clear."

6. The Coleman campaign was vigilant during the recount about enforcing the parties' agreement as embodied in Rule 9 and as explained by Deputy Secretary Gelbmann. Thus, on November 20, early in the recount, Coleman's authorized representative sent an email to Deputy Secretary Gelbmann and the Secretary of State's head of elections, Gary Poser, in which he complained that Anoka County officials had rejected "clear Coleman originals" because of the "lack of a corresponding duplicate." Mr. Gelbmann checked and determined that the allegation was false: The original ballots were, in fact, being counted even when a duplicate could not be found. After being apprised of these facts, Coleman's representative sent an email thanking Deputy Secretary Gelbmann, and stating: "I clarified this yesterday afternoon with Gary Poser and our Anoka County Lead Representative. We understand that Anoka County officials had a telephone conference with Gary Poser on this matter and all proceeded according to the Secretary of State's original directions."

7. It is not only Franken who relied in good faith on the agreement that Coleman had entered into with him and the Secretary of State. County and municipal election officials in 87 counties similarly relied on the Secretary of State's approved guidance in performing their duties. Coleman representatives insisted on the counting of original rather than duplicate ballots when there were more original than duplicate ballots found.

8. On December 19, at the very conclusion of the State Canvassing Board's consideration of ballot challenges, Coleman raised, and the Board considered, his newfound

claim that where the number of original ballots for which duplicates were created exceeded the number of duplicates found, use of the originals might result in double-counting votes.

9. Where, as here, all relevant parties agreed, consistent with Minnesota law, that the original ballots would be counted during the recount whenever possible, Coleman is estopped from challenging the very process to which he agreed. As a result of the parties' agreement, the Secretary of State's Office directed county election officials to tabulate original ballots rather than duplicates. Franken and the entire recount and canvass by both the county canvassing boards and the State Canvassing Board relied on Coleman's action in entering the tripartite agreement, which Coleman insisted should be subject to strict compliance until it no longer served his purposes and he renounced the agreement. Because of Coleman's gross delay, estoppel, laches, and unclean hands bar his stale (and baseless) allegations of double-counting as a ground for challenging the election results.

Estoppel, Laches, and Unclean Hands—Unchallenged Ballots

10. In the course of the recount process, it became apparent that a large number of lawfully cast absentee ballots were erroneously set aside on Election Day and never counted. On December 18, in granting Coleman relief in the lawsuit he had pursued, the Minnesota Supreme Court ordered the parties to establish a process by which, upon the agreement of the local election officials and the candidates that an absentee ballot had been rejected in error, the unopened absentee ballot envelope could be counted and the ballot added to the recount. Under this Order, any agreement that a ballot was improperly rejected was voluntary and unanimity was required before a ballot could be counted.

11. Pursuant to the December 18 Order and a subsequent December 24 Order extending the deadline for compliance, and working well into the afternoon on Christmas Eve,

the Secretary of State's Office, local officials, and the two candidates agreed to the Protocol by which any absentee ballot that the local officials and candidates agreed was rejected in error was to be opened and counted in the election for United States Senator.

12. Local officials in the elections offices and county attorneys offices throughout the state worked long hours throughout the holiday week to identify such ballots and to furnish both candidates lists of ballots recommended to be opened and counted. By the close of business on Friday, December 26, the local officials' lists totaled 1,346 ballots, from 60 counties.

13. Campaign representatives were given the opportunity to object to the 1,346 identified ballots. Eventually, the campaigns reached agreement that 933 of the 1,346 ballots identified by local officials would be opened and counted. These ballots were sent to the Secretary of State's office, where they were opened and counted in the presence of campaign representatives.

14. Coleman is now estopped from challenging the absentee ballots described in paragraph 12(d). Coleman's claims of irregularity as to some of the 933 ballots is also barred by laches and the doctrine of unclean hands.

15. To the extent that Coleman failed to challenge the ballots described in Paragraph 13 of his Notice during the recount, the allegations of that paragraph are barred by laches and estoppel.

Failure to Exhaust Administrative Remedies

16. Coleman had, and frequently took advantage of, the opportunity to have local election officials and the State Canvassing Board address such issues as voter intent, spoiled or distinctively marked ballots, voter eligibility, and absentee ballot validation. To the extent he now raises issues not raised before, he has failed to exhaust his administrative remedies.

COUNTERCLAIMS

For the reasons described in Franken's separate Motion to Dismiss, the Court lacks jurisdiction under Minn. Stat. § 209.12 to make any findings or conclusions regarding irregularities but instead must limit its action to taking and preserving evidence for determination by the United States Senate. Franken seeks only such relief, unless Coleman is allowed to seek any broader relief, in which case Franken requests the same opportunity. For purposes of such marshalling of evidence for the Senate, Franken alleges as follows:

1. All counterclaims are conditioned on rejection by the Court of Franken's arguments as to the Court's jurisdictional limits, the failure of Coleman to state any claim justifying further prosecution of his Notice, and the lack of specificity in all but a few of Coleman's claims. If Coleman is allowed to make general allegations of irregularity (whether denominated errors, illegalities, mistakes, matters, things, or otherwise), Franken alleges that any and all such irregularities operated to his detriment and should be the subject of discovery and preservation of evidence.

2. Franken is a Minnesota resident qualified as an eligible voter under Minnesotan election law. Franken voted in the General Election. In the absence of the irregularities in the determination of the number of ballots lawfully cast in the General Election described below, Franken's margin of victory would be even larger than was certified by the State Canvassing Board.

FIRST COUNTERCLAIM

LAWFULLY CAST ABSENTEE BALLOTS REJECTED BY COLEMAN

3. Although Franken agreed with local election officials that many of the absentee ballots on the list of 1,346 ballots were obviously erroneously rejected, Coleman's campaign

objected to the opening and counting of many such ballots. In Duluth, in St. Louis County, Coleman refused to allow 35 absentee ballots, identified below, to be counted solely because the dates of the signatures of the voter and witness were not the same:

| # | Voter Name | Precinct |
|----|-------------------|-------------|
| 1 | Guilford Lewis | Duluth P-1 |
| 2 | Stephanie Krieg | |
| 3 | Phyllis Sanderson | |
| 4 | Amanda Feiro | |
| 5 | Joan Hughes | |
| 6 | Marian Arras | |
| 7 | Loren Johnson | |
| 8 | Mary Vance Nordin | |
| 9 | Leah Iverson | Duluth P-3 |
| 10 | Patrick McEnaney | |
| 11 | Katie Kwon | |
| 12 | Dorothy Halvorson | |
| 13 | Mary M. Bell | |
| 14 | Jay Baker | |
| 15 | Susan Fryberger | Duluth P-7 |
| 16 | Lauren Hendricks | |
| 17 | Brett Udesen | Duluth P-8 |
| 18 | Susan Wilmes | |
| 19 | Kenneth Ensele | |
| 20 | Claude Kosbab | |
| 21 | Lance Meyer | |
| 22 | Sarah Knutie | |
| 23 | Sarah Gross | Duluth P-13 |
| 24 | Cassandra Saari | |
| 25 | Andrew Scheidel | Duluth P-14 |
| 26 | Gerald Markey | |
| 27 | Donna Campanella | |
| 28 | Dorothy Douglas | Duluth P-15 |

| | | |
|----|------------------|-------------|
| 29 | Paul Nelson | Duluth P-20 |
| 30 | Gladys Nelson | |
| 31 | Loraine Lott | Duluth P-21 |
| 32 | Irwin St. John | |
| 33 | Joanne Woods | Duluth P-26 |
| 34 | June Srok | |
| 35 | Barbara Bischoff | Duluth P-31 |

The ballot envelopes at issue are attached as Exhibit C.

4. Minn. Stat. § 203B.12 does not allow election judges to reject absentee ballots because the voter or the witness misdates their signature or because the voter and witness did not, on the same day, date their averments.

SECOND COUNTERCLAIM

ERRONEOUSLY REJECTED ABSENTEE BALLOTS

5. Franken has identified a large number of absentee ballots that were rejected in error by election judges and local election officials, and which were not included on the list of 1,346 wrongfully rejected absentee ballots created by local election officials, and were not counted as part of the recount. In Exhibit D, for each voter identified below, Franken attaches declarations from each voter and/or other supporting documentation demonstrating that local election officials rejected each ballot in error.

| # | Voter Name | County | Precinct |
|---|--------------------------|-----------|----------------------|
| 1 | Rengo, Brenda | Carlton | Thomson TWP |
| 2 | Tushar, David | Carlton | Carlton |
| 3 | Dustin, Jeffrey | Clay | Moorhead City W2-P3 |
| 4 | Stange, Douglas | Crow Wing | Baxter P-2e |
| 5 | Bartholomay, Jennifer | Dakota | Farmington P-6 |
| 6 | Buck, Harold | Dakota | Burnsville P-08 1280 |
| 7 | Engebretson, Laurence C. | Dakota | Eagan P-01 |

| | | | |
|----|----------------------|----------|-------------------------------|
| 8 | Francis, Rachel | Dakota | Burnsville P-03 |
| 9 | Heinz, Caitlin | Dakota | West St. Paul W-3 P-1 |
| 10 | Holger, Jean | Dakota | Inver Grove Hts P-10 |
| 11 | Kaszynski, Katie | Dakota | Burnsville P-13 |
| 12 | Koenigsberger, Mary | Dakota | West St. Paul W-2 P-1 |
| 13 | Ponds, Leonard | Dakota | Burnsville P-14 |
| 14 | Quinlan, Leona | Dakota | Inver Grove Heights P-08 |
| 15 | Quinlan, Thomas | Dakota | Inver Grove Heights P-08 |
| 16 | Revsbeck, Christy | Dakota | Lakeville P-04 2940 |
| 17 | Traub, Jordan | Dakota | Lakeville P-04 |
| 18 | Washington, Mary | Dakota | Eagan P-02 |
| 19 | Behrens, Bruce | Goodhue | Pine Island W-1 |
| 20 | Ann, Adja Kumba Kaba | Hennepin | Maple Grove P-9 |
| 21 | Applebee, Donald | Hennepin | Minnetonka W2 P-C |
| 22 | Applebee, Donelda | Hennepin | Minnetonka W2 P-C |
| 23 | Brandt, Jordan | Hennepin | Minneapolis W-7 P-4 |
| 24 | Davies, Elizabeth | Hennepin | Minneapolis W-7 P-8 |
| 25 | Decker, Beth | Hennepin | Minneapolis W-7 P-09 |
| 26 | Dressel, Ruth Anne | Hennepin | Plymouth W-3 P-17 |
| 27 | Dropp, Kourtney | Hennepin | Maple Grove P-19 |
| 28 | Erickson, Dennis | Hennepin | Plymouth W-3 P-18 |
| 29 | Gleason, Donald | Hennepin | Edina P-17 |
| 30 | Gorski, Hannah | Hennepin | Bloomington W4-P4 |
| 31 | Larson, Michele J. | Hennepin | St. Louis Park W-1 P-04 |
| 32 | Lindquist, Craig | Hennepin | Minneapolis W-7 P-8 |
| 33 | McCool, Greg | Hennepin | Maple Grove P-9 |
| 34 | Mistereck, Michael | Hennepin | Minneapolis W-10 P-11 1855 |
| 35 | Modrack, Heather | Hennepin | Plymouth W-1 P-03 |
| 36 | Nelson, Mary | Hennepin | Plymouth W-2 P-12 |
| 37 | Nelson, Rebekah | Hennepin | Bloomington W-3 P-22 |
| 38 | Nix, Noel | Hennepin | Minneapolis W-6 P-4 |
| 39 | Nygren, Gordon | Hennepin | Bloomington W-1 P-08 |
| 40 | Rapacz, Nickolas | Hennepin | Minneapolis W-11 P-08 |
| 41 | Robitz, Karen | Hennepin | St. Louis Park W-4 P-16 |
| 42 | Rootes, Neal | Hennepin | Maple Grove P-22 1295 |

| | | | |
|----|-------------------------|---------------|---------------------------------|
| 43 | Schneck, Lauren | Hennepin | Golden Valley P-3 |
| 44 | Seeley, Anthony | Hennepin | Robbinsdale W-3 2665 |
| 45 | Seeley, Rachel | Hennepin | Robbinsdale W-3 2665 |
| 46 | Sullivan-Fedock, John | Hennepin | Minnetonka W1-P-D |
| 47 | Toner, Todd | Hennepin | Minneapolis W1-P2 |
| 48 | Verlo, Audrey | Hennepin | New Hope P-08 |
| 49 | Wells, Priscilla | Hennepin | Hopkins P-6 |
| 50 | Ritter, Molly | Itasca | La Prairie 6 |
| 51 | Roy, Henry | Itasca | Grand Rapids P-05 |
| 52 | Kjolsing, Zachary | Kandiyohi | Dovre Twp |
| 53 | Schiks, Jessup | Kandiyohi | Dovre TWP |
| 54 | Erickson, Deborah | Kittson | Hallock |
| 55 | Windingstad, Dolores | Lac qui Parle | Dawson W-3 |
| 56 | Nelson, Eila | Lake | Two Harbors W-4 |
| 57 | Norlen, Angela | Lake | Two Harbors W-3 |
| 58 | Girtz, Robert | Morrison | Belle Prairie Township |
| 59 | Bredeson, Clarice | Pope | Glenwood P-01 |
| 60 | Mortenson, Donna | Pope | Glenwood P-1 |
| 61 | Anderson, Muriel Elaine | Ramsey | St. Paul W-7 P-04 1460 |
| 62 | Brigham, Catherine | Ramsey | White Bear Lake W-5 P-1 1780 |
| 63 | Bruggeman, Emma | Ramsey | St. Paul W-2 P-01 0680 |
| 64 | Cowan, Ursela | Ramsey | Roseville P9 |
| 65 | Garcia, Josephine | Ramsey | St. Paul W-2 P-14 |
| 66 | Gauster, Gerald | Ramsey | Little Canada P2 |
| 67 | Gauster, Lorraine | Ramsey | Little Canada P2 |
| 68 | Hall, Sophie | Ramsey | St. Anthony P-1 |
| 69 | Horan, Alexis | Ramsey | St. Paul W-3 P-12 |
| 70 | Liebig, Micheal | Ramsey | St. Paul W-1 P-08 0610 |
| 71 | Moore, Tempest | Ramsey | St. Paul W2 P8 |
| 72 | Morphew, Lewanne | Ramsey | Roseville P-03 |
| 73 | Redmond, John | Ramsey | St. Paul W-3 P-2 |
| 74 | Robertus, John | Ramsey | New Brighton P-4 |
| 75 | Thompson, Walter | Ramsey | St. Paul W5-P7 |
| 76 | Jorgensen, Anna Jin | Rice | Fairbault P6 |

| | | | |
|----|--------------------|------------|------------------|
| 77 | Jarvis, Phyllis | St. Louis | Hibbing P-11 |
| 78 | Miller, Barbara | St. Louis | Duluth P-18 |
| 79 | Treloar, Carole | St. Louis | Chisolm |
| 80 | Thies, Lindsay | Steele | Owatonna W-2 P-2 |
| 81 | Frankot, Mary | Washington | Woodbury P-07 |
| 82 | Grandlienard, Ross | Washington | Baytown Twp |
| 83 | Krafthefer, Katie | Washington | Stillwater W2 P3 |
| 84 | Ottman, Orin | Winona | St. Charles 0110 |
| 85 | Stoa, Ryan | Winona | Homer TWP |
| 86 | Simonson, Kathryn | Wright | Otsego 0140 |

Franken has also identified a large number of other absentee ballots that election judges and local election officials rejected in error (or that Franken has reason to believe were rejected in error), including (1) ballots that were included on the list of 1,346 wrongfully rejected absentee ballots created by local election officials, and which were not counted as part of the recount; and (2) ballots that were not included on the list of 1,346 wrongfully rejected absentee ballots created by local election officials. These erroneously rejected absentee ballots are identified in Exhibit E.

THIRD COUNTERCLAIM

MISSING BALLOTS

6. In a number of precincts not selected by Coleman, ballots went missing between Election Day and the recount. Under Minnesota case law, a ballot serves as the best evidence of a vote. But when ballots are missing, or their integrity is otherwise compromised, election officials must turn to the next best evidence: here, the vote totals provided by election officials on Election Day. Where, as here, actual ballots cast on Election Day cannot be found, local election officials must submit—and the State Canvassing Board must accept—the Election Day return as reflecting the proper tally of votes for purposes of the canvass, the recount, and the Board’s certification of the results under Minn. Stat. § 204C.33.

7. In Oakport Township in Clay County, for example, five ballots went missing between Election Day and the recount. Upon the completion of the recount, it was discovered that there was a shortage of five ballots and 5 Franken votes. No ballots had been challenged and no other totals had changed. Election officials looked in all other precinct boxes, other envelopes, and the automatic tabulation machines. The five missing ballots, all cast for Franken, could not be found. Despite the missing ballots, only the number of ballots located during the recount was certified.

8. Similarly, ballots went missing during the course of the recount from the following precincts and were not adjusted for, resulting in a net loss of votes for Franken:

| COUNTY | PRECINCT | NET LOSS TO FRANKEN |
|------------|-----------------------|---------------------|
| Chisago | Chisago City A | 1 |
| Chisago | Harris B | 2 |
| Clay | Moorhead 1-3 | 5 |
| Dakota | Inver Grove Heights 4 | 4 |
| Hennepin | Brooklyn Center 7 | 4 |
| Hennepin | Minneapolis 3-3 | 5 |
| Hennepin | Plymouth 3-18 | 1 |
| Hennepin | Richfield 1-4 | 2 |
| Hubbard | Todd Township 1 | 2 |
| Olmsted | Rochester 3-6 | 2 |
| Ramsey | St. Paul 5-2 | 5 |
| Ramsey | St. Paul 5-8 | 6 |
| Stearns | St. Cloud 3-1 | 2 |
| Washington | Cottage Grove | 5 |
| Washington | Oak Park Heights 2 | 7 |
| Washington | Woodbury 10 | 2 |

FOURTH COUNTERCLAIM

COUNTING OF ORIGINAL AND DUPLICATE BALLOTS

9. If and when Coleman is allowed to and does identify the “numerous precincts throughout the State of Minnesota,” and proves that irregularities did, in fact occur during the

recount, Franken reserves the right to identify additional precincts in which the numbers of original ballots and duplicate ballots were not identical and propose procedures whereby all identified precincts are treated uniformly with respect to inspection and relief, if any, ordered by the Court.

10. Coleman gained votes in the recount in certain precincts where the increase is as likely due to counting of original and duplicate ballots as in the precincts identified by Coleman.

Those precincts are:

| COUNTY | PRECINCT | COLEMAN GAIN |
|-----------|--------------------|--------------|
| Anoka | Columbia Heights 5 | 2 |
| Dakota | Eagan 5 | 2 |
| Dakota | Lakeville 3 | 2 |
| Dakota | Lakeville 6 | 4 |
| Dakota | Rosemount 2 | 2 |
| Dakota | Rosemount 4 | 6 |
| Hennepin | Brooklyn Park C-2 | 3 |
| Hennepin | Plymouth 3 | 2 |
| Ramsey | St. Paul 7-5 | 3 |
| Ramsey | Shoreview 6 | 2 |
| Sherburne | Elk River 2-2B | 2 |
| Wright | Annandale | 4 |

FIFTH COUNTERCLAIM

ILLEGAL VOTES

11. Under Minn. Stat. § 201.014, subd. 2, individuals convicted of felonies whose civil rights have not been restored are ineligible to vote. Under Minn. Stat. § 204C.13, if election judges determine that a voter is not eligible to vote, they must place the ballot of that voter unopened among the spoiled ballots.

12. On November 4, 2008, Eric S. Willems cast a ballot for Coleman at the Lake Town Hall polling station in Roseau County. Although Mr. Willems is a convicted felon whose

voting rights have not been restored, local election judges erroneously allowed Mr. Willems' ballot to be placed in the ballot box. It was thereafter included among the votes certified by the State Canvassing Board on January 5, 2009.

13. Mr. Willems' ballot was not lawfully cast, and therefore was erroneously included in the votes certified by the State Canvassing Board on January 5, 2009.

SIXTH COUNTERCLAIM

COLEMAN'S BIASED REQUEST FOR JUDICIALLY-SUPERVISED RE-RECOUNT

14. Coleman apparently seeks a judicially supervised re-count only in certain precincts selected due to their likelihood of artificially and erroneously changing the net vote difference in Coleman's favor. Such an approach is improper under Chapter 209 and the Minnesota and United States Constitutions, at least unless there is a specific allegation of errors in counting during the recount in those jurisdictions that materially altered the result. Coleman did not provide such allegations within the seven day period allowed by statute. If a judicially supervised re-count is to occur, Franken should be entitled to specify corresponding precincts to be re-counted as part of Coleman's contest. Should that procedure be denied, Franken brings as this counterclaim a claim to re-counting in precincts of his choice.

WHEREFORE, Contestee Al Franken respectfully requests the following relief:

1. That Contestants' Notice of Contest be dismissed with prejudice.
2. That the Court declare and adjudge that Contestant Al Franken is entitled to receive a certificate of election if that has not already been received.
3. That the Court grant Franken attorney fees and costs.
4. That the Court grant to Franken such other relief as is just and equitable.

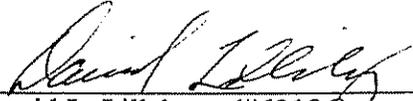
Dated January 12, 2009.

Respectfully submitted,

PERKINS COIE LLP

Marc E. Elias (DC Bar #442007)
Kevin J. Hamilton (Wash. Bar #15648)
David J. Burman (Wash. Bar #10611)
607 Fourteenth Street, N.W., Suite 800
Washington, D.C. 2005-2011
Telephone: (202) 628-6600
*Application for Admission Pro Hac Vice
Pending*

FREDRIKSON & BYRON, P.A.

By: 
David L. Lillehaug (#63186)
200 South Sixth Street, Suite 4000
Minneapolis, Minnesota 55402
Telephone: (612) 492-7000

Attorneys for Contestee Al Franken

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Applicants acknowledge that sanctions may be imposed under Minn. Stat. §549.211.

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