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STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

By  Deputy

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,

**CONTESTEE'S REPLY IN SUPPORT
OF MOTION TO DISMISS**

v.

Al Franken,

Contestee.

Nothing in Coleman's Memorandum of Law in Opposition to Motion to Dismiss ("Opp.") calls into question the analysis set forth in Franken's Memorandum in Support of Contestee's Motion To Dismiss ("Motion to Dismiss"). The central contention in Coleman's brief—that the Court must ignore the plain language of Minn. Stat. § 209.12 because otherwise Coleman will be stripped of the ability to challenge alleged irregularities and illegalities in the results of the November 4 election—entirely ignores the role of the Senate, where Coleman formerly served and which is the forum designated in both the United States Constitution and the Minnesota statute to adjudicate his allegations. The fact that Coleman picked an alternative, intermediate forum does not excuse him from complying with the specific and controlling rules of that forum. Since he has failed to comply with these rules, the Court lacks jurisdiction and must dismiss Coleman's action.

Moreover, because all of Coleman's claims but possibly three are insufficiently "definite and specific," each must be rejected on this second, independent ground. The three fail to state claims. Coleman's arguments make even clearer that his Notice of Contest fails entirely to comply with Minn. Stat. § 209.021 (requiring that a notice "specify the grounds on which the contest will be made") and § 209.12 (prohibiting state court adjudication of alleged irregularities and violations of Minnesota Election Law).

Coleman lost the November 2008 election. Notwithstanding months of scrutinizing every aspect of the process, he has yet to specify the grounds on which he can prevail on a Section 209.12 election contest. His discovery responses of only yesterday state under oath that he does not have evidence to support his claims but simply hopes to find it. No less than 16 times Coleman states under oath in response to Franken's straightforward questions: "Contestants presently lack information sufficient to answer this Interrogatory. " Answers to Interrogatories Nos. 2, 3, 4, 5, 6, 10, 17, 18, 19, 20, 21, 22, 23, 24, 25, 30. (The Answers are Attachment A to this memorandum.) *See id.* No. 13 ("Contestants lack information or belief sufficient to conclude whether or not ballots asserted by the Board to have gone 'missing' even actually existed...").

This approach —attempting to use Minnesota's election-contest mechanism as a disruptive fishing expedition in search of potential claims—is contrary to law.

I. THE COURT LACKS JURISDICTION TO HEAR COLEMAN'S CLAIMS BECAUSE THE NOTICE OF CONTEST FALLS OUTSIDE THE JURISDICTIONAL LIMITS SET BY MINN. STAT. § 209.12.

Section 209.2, and the history of Chapter 209, make it clear that there are three categories of claims that an election-contest court generally might address: recounting the votes under judicial supervision, alleged irregularities, and alleged violations of Minnesota Election Law.

Section 209.12, however, empowers the court in federal legislative contests only to resolve the first and *prohibits* it from adjudicating alleged irregularities and violations of Minnesota Election Law. Coleman's explicit request that the Court expand the "question of who received the largest number of votes legally cast," the judicially-supervised recount, to include the other two categories of claims (Opp. at 3 & 15) would impermissibly read the explicit restriction of jurisdiction out of the statute. Such an approach to statutory construction is never appropriate, but particularly not in a situation in which the courts must strictly limit themselves to the statute to avoid raising constitutional questions. "[T]he legislature has a right to demand, and certainly to expect, that there be strict adherence to any statutory restrictions placed upon the jurisdiction of the courts." *Christenson v. Allen*, 119 N.W.2d 35, 40 (Minn. 1963). The alleged "incidents" of irregularity and illegality could not alter the vote count unless they are adjudicated, and the Minnesota Legislature has said that only the Senate, not the Court, may do so. Coleman's fundamental misperception is to ignore the Senate election contest option and ask the court to fill the artificial vacuum.¹

Coleman's attempts to deride what the court can do as limited "to mere 'mathematical matter[s]," Opp. at 1, ignores its purpose and history. Before the automatic administrative recount was enacted in 1981, the language of Section 209.02—"the question of who received the

¹ "Each house of Congress," being "the sole judge of the election returns and qualifications of its members," *Odegard v. Olson*, 119 N.W.2d 717, 441 (Minn. 1963) (citing Art. 1, § 5, Cl. 1), has adequate, long-standing, and ultimately exclusive election-contest jurisdiction. The House of Representatives relies on the Federal Contested Elections Act, 2 U.S.C. § 381 *et seq.*, which provides for, among other things, notices of contests, depositions, cross examinations, and other mechanisms very much familiar to the courts. The Senate relies on its precedents, which permit any individual to petition for a contest and requires referral of such petitions to the Rules Committee for further adjudication. As an example, after Louisiana held an exceptionally close Senate election in 1996, the Senate heard and adjudicated the losing candidate's petition challenging the election. *See* 143 Cong. Rec. S10253-01 (Oct. 1, 1997); *see also Roudebush v. Hartke*, 405 U.S. 15, 26 n. 24 (1972) ("The Senate itself has recounted the votes in close elections in States where there was no recount procedure."). Coleman has been—and still is—free to bring such a petition in the United States Senate.

largest number of votes legally cast"—was the only form of recount, and the slight variation of that language in Section 209.12 did not expand it beyond that. This is confirmed by the materially identical language chosen by the Legislature when it adopted the administrative recount: "determination of the number of votes validly cast for the office to be recounted." Section 204C.35. It is further confirmed by the apparatus established in Section 209.06 to aid in canvassing and by the distinction drawn in Section 209.12 between the categories of claims. The fact that judicially-supervised recounts serve less of a purpose now that the administrative recount is available (and at government expense) does not mean that the Court is free to go beyond the statutory authority in hopes of finding a broader role. Coleman's resistance to the plain language and common-sense reading of Minn. Stat. § 209.12 ignores the statutory parallelism of these provisions (along with the Constitution and abundant case law).

Coleman's Notice of Contest neither sets forth a claim that can be resolved within Section 209.12's strict limitations nor invokes the remedy of taking and preserving evidence of irregularities to present to the Senate. All of his claims are allegations of irregularity or illegality, which he concedes, in his Answer to Counterclaims, by labeling as an allegation of irregularity each of Franken's conditional counterclaims. As a result, his Notice fails to comply with Minn. Stat. §§ 209.021 and 209.12 and must be dismissed.

A. Coleman Relies on Case Law Confirming That His Contest Falls Outside Section 209.12's Limited Scope.

Although Coleman argues primarily by assertion, *see, e.g.*, Opp. at 2 ("[T]here can be no doubt this Court has jurisdiction to determine not only tabulation issues but also 'incident-based' issues related to the legality of votes."), he does include a few citations to authority. Every single case cited by Coleman confirms the limited scope of Section 209.12.

Ironically, the two related citations upon which Coleman relies most heavily— *Fitzgerald v. Morlock*, 120 N.W.2d 336 (Minn. 1963) ("*Fitzgerald I*") (election contest governed by a statute analogous to Section 209.12); and *Fitzgerald v. Morlock*, 120 N.W.2d 339 (Minn. 1963) ("*Fitzgerald II*") (resolving only canvassing issues)—illustrate the relevant restrictions. As Coleman correctly notes, the court in both *Fitzgerald I* and *II* applied a provision that is almost exactly parallel to Section 209.12. That provision was the precursor to Minn. Stat. § 209.10 ("Former Section 209.10"), governing state legislative contests.² See *Fitzgerald I*, 120 N.W.2d at 338; see also Opp. at 5. The jurisdiction of the *Fitzgerald* courts—like that of this Court—was therefore limited to "which of the parties to the contest received the highest number of votes legally cast at the election." See *Fitzgerald I*, 120 N.W.2d at 338; accord Minn. Stat. § 209.12. As a result, the court's proceedings consisted only of a recanvassing of ballots that had been specifically contested by the parties. The court determined, first, which candidate should receive credit for votes already counted and certified; and second, whether each vote so credited was, as a mathematical matter, appropriately counted. See *Fitzgerald II*, 120 N.W.2d at 343-54. The court set forth its analysis ballot-by-ballot, resolving questions of voter intent and distinguishing marks as evident from the face of each ballot. *Id.* The court then concluded:

² Former Section 209.10 read:

When the contest relates to the office of state senator or representative, the only question to be tried by the court, notwithstanding any other provision of law, shall be the question as to which of the parties to the contest received the highest number of votes legally cast at the election, and as to who is entitled to receive the certificate of election. The judge trying the proceedings shall make findings of fact and conclusions of law upon the question so tried. Further evidence upon the points specified in the notices shall be taken and preserved by the judge trying the contest, . . . but the judge shall make no finding or conclusion thereon. After the time for appeal has expired, or in case of an appeal, after the final judicial determination of the contest, [u]pon application of either of the parties to the contest, the clerk of the district court shall transmit all the files and records of the proceedings with all the evidence taken to the presiding officer of the house of which the contest is to be tried.

Minn. Stat. § 209.10 (as quoted *Fitzgerald I*, 120 N.W.2d at 338 (internal quotation marks and italics omitted and alteration in original)).

The only question before this court on an appeal from a legislative election contest is which party received the highest number of votes legally cast and is entitled to the certificate of election.

Since we have determined that Henry J. Morlock received 10 more votes than John M. Fitzgerald we declare Henry J. Morlock entitled to the certificate of election.

Should this contest be carried to the House of Representatives for trial the particular challenges and exceptions taken by the parties on this appeal will not carry over as controlling there.

Id. at 354. In short, the *Fitzgerald* decisions in no sense call into question the limitations of Section 209.12, as Coleman now suggests. To the contrary, they illustrate precisely how such a statutory mandate must be implemented.

Coleman also misreads another 1963 case, *Odegard v. Olson*, 119 N.W.2d 717 (Minn. 1963), that helps understand Section 209.12. The Minnesota Supreme Court, noting that the election contest statute did not extend to federal legislative races at all, found that the courts had no statutory or constitutional authority to enjoin issuance of a certificate of election for a congressional seat. Concurring Justices made the point that there probably was a constitutional role for a judicially-supervised *recount* (and recall that no administrative recount was then available) as part of the "election process." 119 N.W.2d at 721-23 (concurring opinions of Knutson, C.J., and Rogosheske, J.). But they could not have been more clear that they contemplated only a recount. *Id.* at 721 ("legislature could have provided for a recount of the votes under the supervision of our courts when the original tabulation was questioned"); *id.* ("no doubt that Congress would accept the final tally of the vote after a recount as well as it would accept the original tally without a recount"); *id.* at 722 ("our legislature has not included a recount of the votes, with or without supervision of the courts, as part of the election process with respect to a Representative in Congress"); *id.* ("[a]n election contest which permits a recanvass of the votes cast, under court supervision designed to insure accuracy and fairness").

That same year the Minnesota Legislature heard the message of the concurring Justices and did precisely as they suggested. It included federal legislative offices in Chapter 209, but it limited the adjudicative role of the courts to supervising a recount, and it prohibited more than taking and preserving evidence on the other two categories of claims, irregularities and illegalities.

Coleman's other citations further undermine his argument. Take, for example, *Holmen v. Miller*, 206 N.W.2d 916 (Minn. 1973). It is true that *Holmen*, which also involved a state legislative contest, suggested that a court can resolve claims far broader than those resolved in *Fitzgerald II*. However, this was entirely to be expected, given that the case was decided *after* the Legislature's 1971 amendment to the statute governing state legislative contests. The amendment drastically rewrote and expanded Former Section 209.10, but not Section 209.12. *See* Minn. Stat. § 209.10 (1971) (containing *no* restrictions on the court's ability to resolve any of the three issues set forth in Minn. Stat. § 209.02).³ Indeed, the contrast between the statute only highlights the distinctive nature of a federal contest under Section 209.12. Coleman nevertheless misleadingly applies *Holmen* to the very different and limited language of Section 209.12. *See* Opp. at 6.

Coleman also cites *Johnson v. Trnka*, 154 N.W.2d 185 (Minn. 1967). Yet in *Johnson* the court was resolving an election contest brought over the office of county auditor, a position that is obviously not subject to the strict restrictions of either Section 209.12 or of the Former Section 209.10. A similar distinction renders inapposite both *Hancock v. Lewis*, 122 N.W.2d 592 (Minn. 1963) (special election to determine whether village should issue bonds) and *In re Contest of*

³ The text of the 1971 amendment is available on Minnesota's Revisor of Statutes website at <http://tinyurl.com/7s4485>.

Election of Vetsch, 71 N.W.2d 652 (Minn. 1955) (election contest for office of county sheriff).
But see Opp. at 3, 4, 5, 6 (nevertheless relying on these authorities).

Coleman's remaining citations are simply irrelevant. *See, e.g., O'Ferrall v. Colby*, 2 Minn. 180, 1858 WL 2544 *6 (Minn. 1858) (emphasizing that the proceeding before the court was not "to try the right of any party to the office of senator, but simply to determine whether the plaintiffs [as senators-elect] are entitled, at the hands of the defendant [as the county clerk], to certificates of election to that office"); Opp. at 7 (quoting a passage from *O'Ferrall* that does not support the associated proposition); Opp. at 4 n.1 (citing *Bush v. Gore*, 531 U.S. 98, 105 (2000), for a proposition not found in the decision). At best, Coleman's treatment of these various authorities—and in particular *Fitzgerald I and II*—is startlingly misguided. *See, e.g.,* Opp. at 5 (relying on *Fitzgerald II*'s use of the word "irregularities," void of context, to imply that the court's analysis somehow extended beyond that which is also addressed in a recount).⁴

In short, Coleman relies on authorities that do him no favors. Taken together, they provide strong confirmation that § 209.12 requires this Court to limit its analysis to two related determinations, both analogous to issues addressed in a recount: first, which candidate should receive credit for votes that the Board has already counted and certified; and second, whether each vote so credited was, as a mathematical matter, appropriately counted.

⁴ Coleman's analysis of *Roudebush v. Hartke*, 405 U.S. 15 (1972), is similarly deficient. *Roudebush* approves, in certain circumstances, the use of a state-run recount, which helps to explain why the distinction drawn by § 209.12 makes sense. It does not address the constitutionality of a state-run election contest, as Coleman implies at Opp. at 6. Instead, it affirms that "a State's verification of the accuracy of election results pursuant to its Art. I, s 4, powers is not totally separable from the Senate's power to judge elections and returns" and that, as a result, a state proceeding will be held to usurp the Senate's function "if it frustrates the Senate's ability to make an independent final judgment." *Id.* at 25.

B. The Supreme Court's Recent Decisions Recognize The Limited Scope Of Section 209.12.

Contrary to Coleman's assertion, the Minnesota Supreme Court has never "held this Court is the appropriate forum for resolving the issues pleaded in the Notice of Contest." Opp. at 8. Rather, as set forth in the Motion to Dismiss, Supreme Court precedent requires that Section 209.12 be read narrowly.

Coleman nevertheless attempts to rely on three recently issued Supreme Court opinions addressing the November 4 Senate election.⁵ Yet, as with Coleman's other authorities, each citation confirms that the claims brought by Coleman are not resolvable at an administrative recount, *see, e.g., Coleman v. Minn. State Canvassing Board*, -- N.W.2d --, 2008 WL 5352937 (Minn. Dec. 24, 2008), and, by extension, not resolvable at a Section 209.12, as opposed to United States Senate, election contest. Not one of the passages quoted by Coleman call this conclusion into question. Neither the "election contest proceeding" nor the "evidentiary hearing and fact-finding" to which Coleman refers, Opp. at 9 (internal quotation marks omitted), makes any distinction between proceedings in the state court and the Senate. As for direct references to "an election contest under Minn. Stat. ch. 209," Opp. at 9 (internal quotation marks omitted), they likewise fail to support Coleman's position. It would not be strange at all to refer Coleman's challenges to a Chapter 209 election contest, for this statute provide a method by which to commence resolution of the claims (evidence collection) and even a method by which to resolve them (delivery to the Senate). *See* Minn. Stat. § 209.12 ("Evidence on any other points specified in the notice of contest . . . must be taken and preserved by the judge trying the contest . . . ; but the judge shall make no findings or conclusion on those points."); *see also id.* ("[U]pon

⁵ *See Coleman v. Ritchie*, -- N.W.2d --, 2009 WL 20954 (Minn. Jan. 5, 2009); *Coleman v. Minn. State Canvassing Board*, -- N.W.2d --, 2008 WL 5352937 (Minn. Dec. 24, 2008); *Coleman v. Ritchie*, 758 N.W.2d 306 (Minn. 2008).

application of either party to the contest, the court administrator . . . shall promptly certify and forward the files and records of the proceedings, with all the evidence taken, to the presiding officer of the Senate"). In short, nothing in the recent Supreme Court opinions even calls into question the long-standing authority clarifying the limited scope of Section 209.12.

The scope of Section 209.12 was not in dispute (and not briefed or presented) in any of these cases before the Supreme Court. Had Section 209.12 been at issue, there is little question that the Supreme Court would have engaged in more direct and thorough analysis. *See, e.g., Derus v. Higgins*, 555 N.W.2d 515, 518 (Minn. 1996) (acknowledging, in the analogous context of state-senator contests, "[w]e have stated that the constitutionality of the role assigned the judicial branch with regard to legislative election contests by Minn. Stat. c. 209 is open to question"); *see also id.* at 519 (Page, J., concurring specially) ("To the extent that Minn. Stat. § 209.10 purports to grant [authority to resolve a primary election contest on its merits] to the judicial branch of government, it is unconstitutional.").

C. Contrary To Coleman's Assertions, Franken's Position Has Remained Consistent.

Coleman questions whether Franken's position on the scope of Section 209.12 has remained consistent. This is unfounded. Though Franken will spare the Court a detailed description of the last two months of litigation (and in particular, of the contradictory stances Coleman has taken throughout), Franken does object to Coleman's attempt to misconstrue the parties' positions. *See Opp.* at 11-12. Franken has never limited "election contest" to state courts in derogation of the role of the Senate.

At the outset, Franken's overriding interest in this election—that all validly cast ballots be counted—has remained constant since November 4. For weeks, Franken has had to battle Coleman in order to permit officials to open and count absentee ballots that in the press of

election day had been mistakenly rejected. *See, e.g., Coleman v. Ritchie*, 758 N.W.2d 306 (Minn. Dec. 18, 2008). Coleman, who at the time was dismissing Franken's absentee-ballot position as based on "tortured interpretations of clear Minnesota law," sought, among other things, to hold absentee-ballot voters to a higher standard than poll voters. *See* Letter to Members of the Minnesota State Canvassing Board from Frederic W. Knaak, Counsel for Coleman (Nov. 18, 2008), attached as Attachment B, at 2. Ironically, the logic of Coleman's former argument directly undermines his current position regarding the scope of Section 209.12. *See, e.g., Sheehan v. Ritchie*, No. A08-2169, Reply Memorandum in Support of Amended Petition (Dec. 16, 2008), attached as Attachment C, at 12-13 (quoting the language set forth in Minn. Stat. Sec. 204C.35 limiting a recount "to the determination of the number of votes validly cast" and permitting consideration only of "the ballots cast in the election and the summary statements certified by the election judges," and claiming, as a result, that the recount's scope "obviously does not include an omnibus power to search for, open, verify and recount ballots that were rejected by local election officials").⁶

Having already participated in a meticulous, six-week-long statewide recount of nearly three million ballots, during which time Franken actively opposed Coleman's efforts to stop validly cast ballots from being opened and counted, Franken now simply seeks to have any outstanding election-related issues resolved in the proper forum. These two positions are entirely consistent. Coleman tries to invent inconsistency by taking Franken's quotations out of context, *see Opp.* at 11-12, but it fails for the same reason that his attempted reliance on the recent

⁶ Further examples of Coleman's inconsistencies are easily identified. When he felt it was in his interest to keep absentee ballots unopened, for example, he argued that "[t]he '[s]ubstantial [c]ompliance' [s]tandard [d]oes [n]ot [a]pply" with respect to Minn. Stat. § 203B.12, subd. 2. Reply of the Coleman for Senate Campaign to the Memorandum of the Al Franken Campaign Regarding "Improperly" Rejected Absentee Ballots, *In re: 2008 United States Senate Election*, 5 (Nov. 18, 2008). Now, by contrast, he

Supreme Court opinions goes nowhere: Coleman apparently does not recognize that "election contests" can -- indeed, must -- proceed in the Senate under the United States Constitution, and he appears not to understand that the limited scope of Section 209.12 does provide a method by which to address all Coleman's claims—just not to resolve them at the state-court level.

D. Coleman's Response To Section 209.12 Ignores The Statutory Language, Misconstrues Relevant Precedent, And Confirms There Is No Cure for the Jurisdictional Deficiencies In His Notice.

Perhaps the most fundamental problem with Coleman's interpretation of Section 209.12 is that it fails to impose any meaningful limits on an election contest that, per both the plain meaning of the statute and relevant case law, *must* be narrow in scope. *Compare, e.g.*, Minn. Stat. § 209.12 (identifying the one issue resolvable in a congressional contest) *with* Minn. Stat. § 209.021 (identifying three issues resolvable in contests more generally). Coleman would have this Court consider all "'incident-based' issues related to the legality of votes," Opp. at 2, including any related to "whether a ballot is 'valid' under Minnesota law," *id.* at 4 n.1. But he admits that Section 209.12 excludes at least such "issues" as "systemic inconsistencies" (*Bush v. Gore?* disparities in absentee ballot rejection rates?); "evidence of willful and material violations" (ignoring the only four reasons for rejecting absentee ballots? double-counting?); and a category of "related matters" that is presumably as broad and open-ended as he interprets similar language in his Notice of Contest. Opp. at 5 n.2. While this admission is fatal to much of his Notice, he gives no principled basis for limiting "irregularities" and "illegalities" to the examples he gives. His footnote intercepts many of his claims but does not produce a coherent or workable standard, and the Court is required to read its authority narrowly, not broadly.

apparently believes that if an absentee ballot "substantially complies" with that same statute, "it is a legally cast vote and must be counted." Opp. at 16.

In addition, Coleman simply fails to address many of the authorities and arguments raised in the Motion to Dismiss. He fails to address the precedent and strong policy concerns requiring an "expeditious[] dispos[al] of election contests," *see* Motion To Dismiss at 15; he fails to address the central, constitutional holding of *Odegard v. Olson*, 119 N.W.2d 717 (Minn. 1963), *see* Opp. at 7-8 (addressing only the statutory analysis while relying exclusively on dicta in a concurrence); and he fails to address the authority from both Minnesota and other states calling into question the constitutionality of an expansive election contest, *see* Motion To Dismiss at 8 n.1. This degree to which Coleman simply ignores these (and many other) authorities is telling.

In short, and notwithstanding Coleman's efforts to stretch this election contest beyond all permissible bounds, Section 209.12 requires that this Court limit its analysis to two related determinations: first, which candidate should receive credit for votes that the Board has already counted and certified; and second, whether each vote so credited was, as a mathematical matter, appropriately counted. Because Coleman's Notice fails to bring claims that can be resolved within these limitations and he has elected not to invoke the remedy of taking and preserving evidence of irregularities to present to the Senate, the Notice fails to comply with Minn. Stat. §§ 209.021 and 209.12, and it must be dismissed.

III. COLEMAN'S OPPOSITION ERASES ANY DOUBT AS TO THE INSUFFICIENCY OF HIS CLAIMS.

A. Coleman's Claims Lack The Specificity Necessary To Survive A Motion To Dismiss.

In election contest cases, the burden of pleading is higher than the burden under what Coleman blithely refers to as the "general civil rule procedures." Opp. at 14. *See also* Minn. Stat. § 209.021 ("The notice of contest must *specify* the grounds on which the contest will

be made.") (emphasis added).⁷ As a result, claims brought in an election contest must be dismissed if they are not "definite and specific." *Soper v. Board of County Com'rs of Sibley County*, 48 N.W. 1112, 1112 (Minn. 1891). These heightened standards are also incorporated into Section 209.12, which governs "points specified in the notice of contest" for federal congressional races. Where a complaint fails to establish jurisdiction or to state a claim upon which relief can be granted, dismissal with prejudice and on the merits is appropriate. *See Martens v. Minnesota Min. & Mfg. Co.*, 616 N.W.2d 732, 748 (Minn. 2000); *see also Greenly v. Independent School Dist. No. 316*, 395 N.W.2d 86, 90 n.1 (Minn. App. 1986).

Yet to the extent Coleman's Opposition responds to these mandates at all, it further flouts them: The Opposition advances claims even *more* vague and imprecise. The Opposition basically admits that at most Coleman has specifically alleged only three claims but it then tries to preserve those three issues "as well as other matters." *Opp.* at 1. The concluding footnote similarly refers to an unlimited number of "remaining issues for the contest." *Id.* at p. 19 n. 4. With trial on these "issues" beginning in just over three business days, Franken respectfully submits that evasions of this sort are inexcusable, especially where, as Coleman himself acknowledges, "[t]he parties have lived with these issues through an intensive recount process and know them intimately; there are no surprises here." *Id.* at p. 12.) Such lack of specificity constitutes grounds for dismissal. *See, e.g., Rachner v. Growe*, 400 N.W.2d 749, 752 (Minn. App. 1987) (dismissing notice that did not "sufficiently apprise" the contestee of the relevant claims).

⁷ Instead of citing § 209.021, Coleman relies on § 209.065, which addresses trial procedure, not the sufficiency standard for pleadings. *See Opp.* at 14. In any event, even Minn. Stat. § 209.065 limits reliance on the generally applicable civil rules: The "court shall proceed in the manner provided for the trial of civil actions *so far as practicable*." *Id.* (emphasis added). Given that the preceding sentence in § 209.065 itself requires that the trial begin "as soon as practicable within 20 days after the filing of the

At an absolute minimum, the specificity requirements limit Coleman to the three claims he attempts to identify in his Opposition and where he has specified at least the nature of the irregularity and the involved precincts and sometimes ballots involved: 1) "approximately 650" rejected absentee ballots specified by Coleman in the recount; 2) alleged double-counting of duplicate and original ballots in 22 precincts; and 3) 133 missing ballots in one Minneapolis precincts. Opp. at 1, 15-18 and Notice of Contest ¶¶ 10, 11, 12(a), 12(c) and Exhibits B-1, B-2, C, & G. All other claims, and the suggestion that similar irregularities occurred in other but unidentified precincts to unidentified voters, are too vague to survive dismissal or have now been waived.

B. Each Of The Three Claims Coleman Tries To Preserve Fails To State A Claim Upon Which Relief May Be Granted.

1. Coleman's absentee ballot claim is too vague to survive dismissal.

Coleman's purported absentee-ballot claim did allege irregularities in the failure to accept at least some of the 654 absentee ballots identified in the recount and largely included as exhibits to the Notice of Contest. However, he has not alleged that any irregularity would affect the outcome, and that allegation of materiality is required before the Court burden itself and the Senate with taking and forwarding evidence, even had he invoked that procedure. In fact, his request for a staging of the trial confirms "the speculative nature of the notice." *Christenson*, 119 N.W.2d at 39. If Coleman thought that correcting any illegal handling of the 654 rejected absentee ballots would change the election outcome, he would not have made the rest of his case contingent on merely shrinking his margin of defeat after addressing the ballots.

notice of contest" it is clear that a heightened pleading standard is a practical necessity warranting exception from the usual rules.

2. Coleman's alleged double-counting claim falls outside the scope of § 209.12 and fails for lack of a remedy.

Even if it obtains specificity by being limited to the 22 precincts, Coleman's double-counting claim does not invoke the evidence-preservation procedure for this (or any other) claim. It should be dismissed on that ground.

In addition, Coleman has not alleged materiality, and there is no cognizable remedy – both points notably unrebutted in Coleman's Opposition. Because neither a new election nor throwing out ballots is among the remedies statutorily available, this Court is powerless to provide them. *See Derus*, 555 N.W.2d at 516 n.1. Indeed, either action would amount to a remedy for an election irregularity and, as such, would have to be presented to the United States Senate. Yet no other remedy would resolve Coleman's alleged "double counting" claim. It therefore cannot be resolved in this contest.

3. Coleman's "Minneapolis 133 missing ballot" claim falls outside the scope of § 209.12 and fails as a matter of law.

The numerous deficiencies in Coleman's so-called "missing ballot" claim have already been addressed at some length. *See* Motion to Dismiss at 22-25. Stated succinctly, the claim falls outside the scope of Section 209.12, and, as a matter of law, contradicts a truly staggering collection of Minnesota case law and out-of-state authority. Coleman appears to have no answer; the silence is deafening. The claim should be dismissed.

IV. CONCLUSION.

This litigation began on Tuesday, January 6. Two weeks have since passed, and, pursuant to statute, trial must begin in six days' time. Yet Coleman's claims remain vague, sprawling, and unsupported. He did not even attempt to make them more specific in his discovery responses, explaining instead that he wants to keep looking for problems that might or

might not exist. Meanwhile, the nation faces serious and exigent problems, and only one Senator sits from Minnesota.

Coleman's Notice of Contest provides a striking illustration of the necessity for (and wisdom behind) both Section 209.12's limited scope and the heightened pleading standard governing Minnesota's election contests. "To invoke a court's jurisdiction, open the ballots, and subject to scrutiny the acts of sworn officials, to expose the contestee to considerable expense, and to affect the public interest by preventing the declared winner from taking office during the delay occasioned by the proceeding is surely too great a price to pay for honoring a defeated candidate's desire to inspect the ballots in order to marshal evidence upon which to justify instituting an election contest." *Christenson*, 119 N.W.2d at 35. That is precisely what is happening here.

Dated January 20, 2009.

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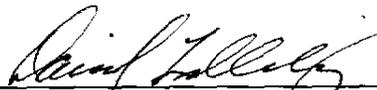
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ACKNOWLEDGMENT

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



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STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Case No.: 62-CV-09-56

In the Matter of the Contest of
General Election held on November 4, 2008
for the purpose of electing a United States
Senator from the State of Minnesota,

Cullen Sheehan and Norm Coleman,

Contestants,

vs.

Al Franken,

Contestee.

***CONTESTANTS' ANSWERS TO CONTESTEE AL FRANKEN'S FIRST SET OF
INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO
CONTESTANTS***

TO: Al Franken, Contestee, and his counsel of record, David L. Lillehaug, Fredrikson & Byron, P.A., 200 South Sixth Street, Minneapolis, MN 55402 and Marc E. Elias, Esq., Kevin J. Hamilton, Esq. and David J. Burman, Esq., Perkins Coie, LLP, 607 Fourteenth Street N.W., Suite 800, Washington, DC 20005-2011.

Contestants Cullen Sheehan and Norm Coleman, for their answers to Contestee's Interrogatories and Requests for Production of Documents, through their undersigned counsel, hereby state and allege as follows:

INTRODUCTION

This is an extraordinary proceeding regarding a matter of extraordinary importance. The extremely brief period available for discovery, together with the extensive nature of the information the parties must gather from more than 100 governmental entities, has made it impossible to be able to provide all of the requested information. The simple fact is that much of the information necessary for specific answers is still in the hands of those governmental entities.

Additionally, the three (3) judge panel (the "Panel") appointed to hear the trial in this matter has not yet ruled on the Motion filed by Contestants contemporaneous with the service and filing of the Notice of Contest seeking an Order appointing inspectors and adopting inspection procedures pursuant to Minnesota Statutes § 209.06. Because the Panel has not yet provided procedures for inspection of election materials and ballots, and because the Panel has not yet appointed any inspectors pursuant to Minnesota Statutes § 209.06, Contestants have been unable to fully investigate this matter thoroughly.

Contestants agree that both sides are entitled to know the specific claims to be pursued at trial. Contestants have asked the governmental entities to provide all requested information to both sides. Contestants will endeavor to supplement these Answers as quickly as possible under the circumstances, so that both sides have equal access to this information as they present their claims at trial.

OBJECTIONS

1. Contestants object to the Instructions submitted by Contestee as part of Contestee's interrogatories, and will respond in accordance with the requirements of the Minnesota Rules of Civil Procedure.

2. Contestants object to each interrogatory to the extent that it seeks information subject to the attorney/client privilege, work product doctrine, or otherwise seeks the disclosure of mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of Contestants in this litigation.

3. The answers provided herein are given with the understanding that by so doing, Contestants do not waive work product protection.

4. Contestants' answers to the interrogatories are based upon the information and documents currently known to Contestants and currently in Contestants' possession, custody, or control. Contestants have not yet concluded their investigation or discovery of the facts relating

to this case. Without obligating themselves to do so, Contestants hereby reserve the right to further supplement their answers to these interrogatories as discovery proceeds in this matter.

ANSWERS TO INTERROGATORIES

1. With respect to the first paragraph of the Notice of Contest, identify each specific action of the Minnesota State Canvassing Board from which you "appeal" and identify specifically:

- A. Each ballot, by county, precinct and voter name, that you allege was affected;
- B. The basis for your "appeal"; and
- C. All evidence supporting your "appeal".

ANSWER: Contestants presently lack information sufficient to answer this Interrogatory completely at present. Investigation as to these matters is therefore yet ongoing, and Contestants reserve the right to further supplement this answer as discovery proceeds in this matter. Subject to the foregoing, please note the following:

- **Challenged Ballots:** *Exhibit A-1* attached hereto identifies ballots which Contestants believe the Minnesota State Canvassing Board (herein, the "Board") certified in error due to allocation mistakes by representatives of the Minnesota Secretary of State, as well as ballots challenged by the parties during the recount but which do not appear to have been allocated by representatives of the Minnesota Secretary of State at all within the numbers certified by the Board. *Exhibit A-2* attached hereto identifies ballots which Contestants believe the Board certified in error due to erroneous Board interpretation of voter intent. Contestants are currently reviewing all of the ballots challenged by the parties during the recount and will supplement this answer with documentary evidence upon completion of such review and investigation process; however, Contestants do not possess the actual ballots and hence do not possess the exhibits Contestants intend to introduce as evidence at trial in this matter. Contestants also intend to depose one or more representatives of the Minnesota Secretary of State in an effort to clarify these matters as part of an ongoing investigative process into these matters.
- **Erroneously Certified Numbers:** *Exhibit B* attached hereto identifies precincts which Contestants believe the Board certified in error due to data entry errors by representatives of the Minnesota Secretary of State during the recount process. Contestants are currently reviewing recount summary statements and numbers certified by the Board in all precincts and will supplement this answer with documentary evidence upon completion of such review and investigation process. Contestants are currently reviewing all of the summary statements prepared by recount officials and comparing those statements to the numbers certified by the Board ballots challenged by the parties during the recount and will supplement this answer with documentary evidence upon completion of such review and investigation process. Contestants also intend to depose one or more representatives of the Minnesota Secretary of State in an effort to clarify these matters as part of an ongoing investigative process into these matters.

2. With respect to Paragraph 9(a) of the Notice of Contest, identify each specific "irregularit[y], matter[] or thing[]" that is not set forth in the Notice of Contest that you intend to establish at trial if allowed to do so.

ANSWER: Contestants presently lack information sufficient to answer this Interrogatory. Contestants' counsel and Contestee's counsel have served numerous subpoenas and data practices requests on election officials throughout the State of Minnesota; however, few responses have yet been received. Moreover, because the Panel has not yet appointed any inspectors pursuant to Minnesota Statutes § 209.06 or established procedures for inspection of election materials and ballots, Contestants have been unable to fully investigate this matter thoroughly. Notwithstanding the foregoing, see *Exhibit A* through *Exhibit F* attached hereto. Investigation as to these matters is therefore yet ongoing, and Contestants reserve the right to further supplement this answer as discovery proceeds in this matter. Subject to the foregoing, Contestants expect to establish, among other things, that a substantial majority of the rejected absentee ballots are legally cast votes.

3. With respect to Paragraph 9(b) of the Notice of Contest, identify each specific "error[], mistake[] and other irregularit[y]" that you allege regarding the "counting, tallying, recording, adding, returning and canvassing of Ballots."

ANSWER: Contestants presently lack information sufficient to answer this Interrogatory. Contestants' counsel and Contestee's counsel have served numerous subpoenas and data practices requests on election officials throughout the State of Minnesota; however, few responses have yet been received. Moreover, because the Panel has not yet appointed any inspectors pursuant to Minnesota Statutes § 209.06 or established procedures for inspection of election materials and ballots, Contestants have been unable to fully investigate this matter thoroughly. Notwithstanding the foregoing, see *Exhibit A* through *Exhibit F* attached hereto. Investigation as to these matters is therefore yet ongoing, and Contestants reserve the right to further supplement this answer as discovery proceeds in this matter.

4. With respect to Paragraph 9(c) of the Notice of Contest, identify each specific "error[], mistake[] and other irregularit[y]" that you allege regarding the "recanvass of Ballots."

ANSWER: Contestants presently lack information sufficient to answer this Interrogatory. Contestants' counsel and Contestee's counsel have served numerous subpoenas and data practices requests on election officials throughout the State of Minnesota; however, few responses have yet been received. Moreover, because the Panel has not yet appointed any inspectors pursuant to Minnesota Statutes § 209.06 or established procedures for inspection of election materials and ballots, Contestants have been unable to fully investigate this matter thoroughly. Notwithstanding the foregoing, see *Exhibit A* through *Exhibit F* attached hereto. Investigation as to these matters is therefore yet ongoing, and Contestants reserve the right to further supplement this answer as discovery proceeds in this matter.

5. With respect to Paragraph 9(d) of the Notice of Contest, identify each specific "error[], mistake[] and other irregularit[y]" that you allege regarding the "counting, tallying, recording and adding of Ballots during the Recount."

ANSWER: Contestants presently lack information sufficient to answer this Interrogatory. Contestants' counsel and Contestee's counsel have served numerous subpoenas and data practices requests on election officials throughout the State of Minnesota; however, few responses have yet been received. Moreover, because the Panel has not yet appointed any inspectors pursuant to Minnesota Statutes § 209.06 or established procedures for inspection of election materials and ballots, Contestants have been unable to fully investigate this matter thoroughly.

Notwithstanding the foregoing, see Exhibit A through Exhibit F attached hereto. Investigation as to these matters is therefore yet ongoing, and Contestants reserve the right to further supplement this answer as discovery proceeds in this matter.

6. With respect to the final sentence of Paragraph 9 of the Notice of Contest, identify the specific errors in numbers of ballots legally cast for each candidate in each precinct that resulted from the irregularities you allege.

ANSWER: Contestants presently lack information sufficient to answer this Interrogatory. Contestants' counsel and Contestee's counsel have served numerous subpoenas and data practices requests on election officials throughout the State of Minnesota; however, few responses have yet been received. Moreover, because the Panel has not yet appointed any inspectors pursuant to Minnesota Statutes § 209.06 or established procedures for inspection of election materials and ballots, Contestants have been unable to fully investigate this matter thoroughly. Notwithstanding the foregoing, see Exhibit A through Exhibit F attached hereto. Investigation as to these matters is therefore yet ongoing, and Contestants reserve the right to further supplement this answer as discovery proceeds in this matter.

7. For each of the approximately 650 "Additional Absentee Ballots" referenced in Paragraph 10 of the Notice of Contest, including, but not limited to, the ballots referenced in Paragraph 11, Exhibit B-1:

- A. Identify the name, county, and precinct of each voter.
- B. State the reason(s) the ballot was rejected by local officials.
- C. State the full factual basis for your contentions that each ballot was rejected wrongfully and should be counted.

ANSWER: Pursuant to Minn. R. Civ. P 33.05, Contestants refer Contestee to the list previously provided to them identifying each such ballot. Contestants believe each such ballot was cast by a voter who was alive on election day, who was registered or included a registration card inside the envelope, and who did not otherwise vote on election day, and as such was in complete or substantial compliance with Minn. Stat. § 203B.12, and should be opened and counted (so long as the voter's intent can be determined from the face of the ballot).

8. With respect to Paragraph 10 of the Notice of Contest, identify each other instance, beyond the "example," of wrongfully excluded ballots you seek to establish at trial if allowed to do so and identify specifically:

- A. Each ballot, by county, precinct and voter name, that you allege was improperly excluded;
- B. The basis for your allegation that it was improperly excluded; and
- C. All evidence supporting your contention that the ballot was improperly excluded.

ANSWER: Pursuant to Minn. R. Civ. P. 33.05, Contestants refer Contestee to the copies previously obtained by both parties from counties and municipalities of the 11,000+ rejected absentee ballot envelopes. Contestants believe every such ballot cast by a voter who was alive on election day, who was registered or included a registration card within the envelope, and who did not otherwise vote on election day is in complete or substantial compliance with Minn. Stat. §

203B.12, and should be opened and counted (so long as the voter's intent can be determined from the face of the ballot).

9. With respect to Paragraph 11 of the Notice of Contest, identify each absentee ballot, by county, precinct and voter name, that you allege was improperly rejected. For each such ballot, identify specifically:

- A. The basis for your allegation that it was improperly rejected;
- B. All evidence supporting your contention that the ballot was improperly rejected.

ANSWER: Pursuant to Minn. R. Civ. P. 33.05, Contestants refer Contestee to the copies previously obtained by both parties from counties and municipalities of the 11,000+ rejected absentee ballot envelopes. Contestants believe every such ballot cast by a voter who was alive on election day, who was registered or included a registration card within the envelope, and who did not otherwise vote on election day is in complete or substantial compliance with Minn. Stat. § 203B.12, and should be opened and counted (so long as the voter's intent can be determined from the face of the ballot).

10. With respect to Paragraph 12 of the Notice of Contest, identify each other instance, beyond the "examples," of wrongfully included ballots you seek to establish at trial if allowed to do so.

ANSWER: Contestants presently lack information sufficient to answer this Interrogatory. Contestants' counsel and Contestee's counsel have served numerous subpoenas and data practices requests on election officials throughout the State of Minnesota; however, few responses have yet been received. Moreover, because the Panel has not yet appointed any inspectors pursuant to Minnesota Statutes § 209.06 or established procedures for inspection of election materials and ballots, Contestants have been unable to fully investigate this matter thoroughly. Investigation as to these matters is therefore yet ongoing, and Contestants reserve the right to further supplement this answer as discovery proceeds in this matter.

11. For each of the "numerous precincts throughout the State of Minnesota," as alleged in Paragraph 12(a) of the Notice of Contest, as to which you contend that "ballots were counted twice," identify the precinct, state the number of ballots that were counted twice, and describe all evidence supporting your contention.

ANSWER: The precincts in which errors occurred due to double-counting of votes are identified on Exhibit C-1 attached hereto. Contestants presently lack information sufficient to completely answer this Interrogatory. Contestants' counsel and Contestee's counsel have served numerous subpoenas and data practices requests on election officials throughout the State of Minnesota; however, few responses have yet been received. Moreover, because the Panel has not yet appointed any inspectors pursuant to Minnesota Statutes § 209.06 or established procedures for inspection of election materials and ballots, Contestants have been unable to fully investigate this matter thoroughly, including the total number of ballots which may be at issue. Investigation as to these matters is therefore yet ongoing, and Contestants reserve the right to further supplement this answer as discovery proceeds in this matter.

12. For each of the "numerous precincts throughout the State of Minnesota," as alleged in paragraph 12(b) of the Notice of Contest, as to which you contend that "ballots which were not

counted on election night” were “found and counted during the recount” and which “exceed the number of persons who voted in such precincts,” identify each such precinct, state the number of ballots that were “found,” describe the circumstances under which they were found, state the full factual basis for the contention that the ballots exceed the number of person who voted, and describe all other evidence supporting your contentions.

ANSWER: The precincts in which errors occurred due to extra ballots found with chain of custody questions are identified on *Exhibit D*. However, Contestants presently lack information sufficient to completely answer this Interrogatory. Contestants’ counsel and Contestee’s counsel have served numerous subpoenas and data practices requests on election officials throughout the State of Minnesota; however, few responses have yet been received. Moreover, because the Panel has not yet appointed any inspectors pursuant to Minnesota Statutes § 209.06 or established procedures for inspection of election materials and ballots, Contestants have been unable to fully investigate this matter thoroughly, including the total number of ballots which may be at issue. Investigation as to these matters is therefore yet ongoing, and Contestants reserve the right to further supplement this answer as discovery proceeds in this matter.

13. Do you contend that the “missing” ballots referenced in Paragraph 12(c) of the Notice of Contest never actually existed? If so, other than the documents attached as Exhibit G to the Notice of Contest, describe all evidence that supports your contention.

ANSWER: Contestants lack information or belief sufficient to conclude whether or not ballots asserted by the Board to have gone “missing” ever actually existed and asserts that no such evidence exists. Investigation into this matter is therefore yet ongoing, including the deposition of Minneapolis Elections Director Cynthia Reichert to occur on Monday, January 19, 2009. Notwithstanding the foregoing, Contestants possess no responsive documents other than those attached to the Notice of Contest. Contestants reserve the right to further supplement this answer as discovery proceeds in this matter.

14. Do you contend that any of the ballot envelopes “erroneously opened and counted by the Minnesota Secretary of State’s Office on Saturday January 3, 2009” as alleged in Paragraph 12(d) of the Notice of Contest, had not been accepted for counting by representatives of the Coleman Campaign during the regional reviews of absentee ballots that took place on December 30 and 31, 2008, and on January 2, 2009? If so, identify each such ballot that was not accepted by a representative of the Coleman Campaign during the regional reviews and describe all evidence which supports your contention.

ANSWER: Contestants’ counsel and Contestee’s counsel have forwarded data practices requests to the Minnesota Secretary of State to determine which absentee ballot envelopes were actually opened on January 3, 2009. However, this information will not be provided until Tuesday, January 20, 2009 at 1:30 p.m. Accordingly, Contestants presently lack information sufficient to determine whether or not any absentee ballot envelopes that were opened, and the ballots therein counted, were illegally and improperly opened and counted. Notwithstanding the foregoing, see answer to Interrogatory Number 15 below. Investigation as to these matters is therefore yet ongoing, and Contestants reserve the right to further supplement this answer as discovery proceeds in this matter.

15. With respect to Interrogatory 14, as to all ballots that you admit were accepted for counting by all representatives of the Coleman Campaign, identify whether you contend that such acceptance is not binding and describe all evidence that supports any such contention.

ANSWER: Prior to the opening of previously-rejected absentee ballots on January 3, 2009, counsel for the Coleman campaign requested that they be given access to registration rolls and election-day sign-in sheets during the rejected absentee ballot envelope analysis process to verify these matters; however, counsel for the Franken campaign objected to this request and local election officials similarly refused to provide such data. Some local election officials and county attorneys cited provisions of Minnesota law whereby voter registration information is not public data until it is entered into the statewide registration database. Minn. Stat. § 204B.40.

As a result, the only verification of voter registration status and lack of voting twice was the protocol agreed to by the parties (Coleman campaign, Franken campaign and local election officials) which required that local election officials deliver a letter to each campaign certifying in writing that the person casting the absentee ballot: (a) was properly registered to vote in the State of Minnesota; and (b) did not vote on election day, either in person or by separate absentee ballot. The campaigns were *not* provided access to registration rolls and election-day sign-in sheets and, therefore, counsel for the Coleman Campaign was unable to verify whether or not the persons whose absentee ballot envelopes were rejected were in fact registered to vote or had voted in person or by separate absentee ballot on election day. Instead, the Coleman campaign had to rely solely on the written certification of a local election official as to registration and lack of having voted; a significant number of counties failed to provide these written letters prior to the opening of envelopes and counting of ballots on January 3, 2009.

Due to this lack of certification, counsel for the Coleman Campaign formally objected to opening the envelopes and counting the ballots before the process began on January 3, 2009. However, despite such objections, the Minnesota Secretary of State proceeded with the opening and counting process on January 3, 2009.

Obviously, both verification of registration status and avoidance of double voting are necessary, because Minnesota law requires that all persons voting be registered to vote (Minn. Stat. §§ 204C.10, 203B.24) and that persons vote only once (Minn. Stat. § 204C.14(b)). Accordingly, if *any* previously rejected absentee ballot envelopes were opened, and the ballots therein counted, by the Minnesota Secretary of State on January 3, 2009, but the persons submitting such ballots were not registered, *or* had already voted on election day, such ballot was not "legally cast".

Any certification of such a ballot by the Board is erroneous, whether or not previously agreed to by the campaigns and local election officials. Notwithstanding any such agreement, and notwithstanding the Order of the Minnesota Supreme Court, ballots illegally cast must not be counted by the Panel in this election contest.

However, as indicated in the Answer to Interrogatory Number 14, Contestants' counsel and Contestee's counsel have forwarded data practices requests to the Minnesota Secretary of State to determine which absentee ballot envelopes were actually opened on January 3, 2009. However, this information will not be provided until Tuesday, January 20, 2009 at 1:30 p.m. Accordingly, Contestants presently lack information sufficient to determine whether or not any absentee ballot envelopes that were opened, and the ballots therein counted, were illegally and improperly opened

and counted. Investigation as to these matters is therefore yet ongoing, and Contestants reserve the right to further supplement this answer as discovery proceeds in this matter.

16. Do you contend that any of the ballot envelopes "erroneously opened and counted by the Minnesota Secretary of State's Office on Saturday, January 3, 2009," as alleged in Paragraph 12(d) of the Notice of Contest, were from voters who had actually voted in person on Election Day? If so, identify all such ballots by voter name, county, and precinct and describe all evidence which supports your contention.

ANSWER: See answers to Interrogatories 14 and 15 above.

17. With respect to Paragraph 12(e) of the Notice of Contest, identify each absentee ballot, by county, precinct and voter name, which was improperly accepted by local election officials on Election Day and counted. Also, for each such ballot, state whether:

- A. The envelope did not comply with the requirements of Minn. Stat. §§ 203B.13 and/or 203B.24 and, if so, how;
- B. The person who cast the ballot was not properly registered to vote and, if so, why;
- C. Whether the person voted in person or by other absentee ballot on Election Day; and
- D. Describe all evidence supporting your contention that the ballot was improperly accepted.

ANSWER: Contestants presently lack information sufficient to answer this Interrogatory. Contestants' counsel and Contestee's counsel have served numerous subpoenas and data practices requests on election officials throughout the State of Minnesota; however, few responses have yet been received. Moreover, because the Panel has not yet appointed any inspectors pursuant to Minnesota Statutes § 209.06 or established procedures for inspection of election materials and ballots, Contestants have been unable to fully investigate this matter thoroughly. Investigation as to these matters is therefore yet ongoing, and Contestants reserve the right to further supplement this answer as discovery proceeds in this matter.

18. With respect to the allegations in Paragraph 13 of the Notice of Contest, list each ballot, by county, precinct and Recount challenge number, which you contend was wrongfully counted during the Recount.

ANSWER: Contestants presently lack information sufficient to answer this Interrogatory. Contestants' counsel and Contestee's counsel have served numerous subpoenas and data practices requests on election officials throughout the State of Minnesota; however, few responses have yet been received. Moreover, because the Panel has not yet appointed any inspectors pursuant to Minnesota Statutes § 209.06 or established procedures for inspection of election materials and ballots, Contestants have been unable to fully investigate this matter thoroughly. Notwithstanding the foregoing, see *Exhibit A* through *Exhibit F* attached hereto. Investigation as to these matters is therefore yet ongoing, and Contestants reserve the right to further supplement this answer as discovery proceeds in this matter. Investigation as to these matters is therefore yet

ongoing, and Contestants reserve the right to further supplement this answer as discovery proceeds in this matter.

19. With respect to the allegations in Paragraph 14 of the Notice of Contest, list each ballot, by county, precinct and Recount challenge number, which you contend was wrongfully counted during the Recount because the voter "did not comply with all of the requirements of the Minnesota Election Law," explain how the voter did not so comply and describe all evidence which supports your contention.

ANSWER: Contestants presently lack information sufficient to answer this Interrogatory. Contestants' counsel and Contestee's counsel have served numerous subpoenas and data practices requests on election officials throughout the State of Minnesota; however, few responses have yet been received. Moreover, because the Panel has not yet appointed any inspectors pursuant to Minnesota Statutes § 209.06 or established procedures for inspection of election materials and ballots, Contestants have been unable to fully investigate this matter thoroughly. Investigation as to these matters is therefore yet ongoing, and Contestants reserve the right to further supplement this answer as discovery proceeds in this matter.

20. With respect to the allegations in Paragraph 15 of the Notice of Contest, list each ballot, by county, precinct and Recount challenge number, which you contend was wrongfully counted during the Recount because the voter "was unqualified and ineligible" to vote, identify the voter by name, explain how the voter was unqualified and ineligible, and describe all evidence which supports your contention.

ANSWER: Contestants presently lack information sufficient to answer this Interrogatory. Contestants' counsel and Contestee's counsel have served numerous subpoenas and data practices requests on election officials throughout the State of Minnesota; however, few responses have yet been received. Moreover, because the Panel has not yet appointed any inspectors pursuant to Minnesota Statutes § 209.06 or established procedures for inspection of election materials and ballots, Contestants have been unable to fully investigate this matter thoroughly. Notwithstanding the foregoing, see responses to Interrogatory Numbers 14 and 15 above. Investigation as to these matters is therefore yet ongoing, and Contestants reserve the right to further supplement this answer as discovery proceeds in this matter.

21. With respect to the allegations in Paragraph 16 of the Notice of Contest, identify by name, county and precinct each person who voted more than once in violation of the Minnesota election law and whose vote was wrongfully counted during the Recount, and, for each such person, state the evidence that that person voted more than once.

ANSWER: Contestants presently lack information sufficient to answer this Interrogatory. Contestants' counsel and Contestee's counsel have served numerous subpoenas and data practices requests on election officials throughout the State of Minnesota; however, few responses have yet been received. Moreover, because the Panel has not yet appointed any inspectors pursuant to Minnesota Statutes § 209.06 or established procedures for inspection of election materials and ballots, Contestants have been unable to fully investigate this matter thoroughly. Investigation as to these matters is therefore yet ongoing, and Contestants reserve the right to further supplement this answer as discovery proceeds in this matter.

22. With respect to the allegations in Paragraph 17 of the Notice of Contest, list each ballot, by county, precinct and Recount challenge number, which you contend was wrongfully rejected during the Recount, explain the reason you believe each ballot was wrongfully rejected, and describe all evidence which supports your contention.

ANSWER: Contestants presently lack information sufficient to answer this Interrogatory. Contestants' counsel and Contestee's counsel have served numerous subpoenas and data practices requests on election officials throughout the State of Minnesota; however, few responses have yet been received. Moreover, because the Panel has not yet appointed any inspectors pursuant to Minnesota Statutes § 209.06 or established procedures for inspection of election materials and ballots, Contestants have been unable to fully investigate this matter thoroughly. Investigation as to these matters is therefore yet ongoing, and Contestants reserve the right to further supplement this answer as discovery proceeds in this matter.

23. List, by precinct, each of the "several precincts" where election judges failed to initial the backs of Ballots, as alleged in Paragraph 18 of the Notice of Contest, and for each such precinct, state the number of ballots not initialed.

ANSWER: Contestants presently lack information sufficient to answer this Interrogatory. Contestants' counsel and Contestee's counsel have served numerous subpoenas and data practices requests on election officials throughout the State of Minnesota; however, few responses have yet been received. Moreover, because the Panel has not yet appointed any inspectors pursuant to Minnesota Statutes § 209.06 or established procedures for inspection of election materials and ballots, Contestants have been unable to fully investigate this matter thoroughly. Investigation as to these matters is therefore yet ongoing, and Contestants reserve the right to further supplement this answer as discovery proceeds in this matter.

24. With respect to the allegations in Paragraph 19 of the Notice of Contest, other than the matters stated in Paragraphs 11 through 17 of the Notice of Contest, describe precisely and in detail each other "obvious error" the State Canvassing Board failed to detect and correct and identify by county, precinct and Recount challenge number each ballot affected by such error.

ANSWER:

Contestants presently lack information sufficient to answer this Interrogatory completely at present. Contestants' counsel and Contestee's counsel have served numerous subpoenas and data practices requests on election officials throughout the State of Minnesota; however, few responses have yet been received. Moreover, because the Panel has not yet appointed any inspectors pursuant to Minnesota Statutes § 209.06 or established procedures for inspection of election materials and ballots, Contestants have been unable to fully investigate this matter thoroughly. Notwithstanding the foregoing, note the following:

- Due to the interpretation by Gary Poser of Rule 9 of the recount procedures adopted by Board that only the ballots found in the originals envelope would be counted in the recount, even when the number of marked duplicates did not match the number of ballots in the originals envelope, many ballots legally cast on election day were not counted during the recount. The precincts in which this occurred are identified on Exhibit C-2 attached hereto.

- Exhibit E attached hereto identifies precincts in which ballots which were counted on election day were not counted during the recount. The Board's certification of the results from such precincts was clearly erroneous.
- Exhibit F attached hereto identifies precincts in which irregularities occurred during the recount requiring further investigation in this contest. These irregularities are reported in incident logs prepared by recount officials and/or as reported to the Coleman for Senate campaign by representatives of Coleman for Senate campaign that attended the recount in various precincts. To the extent that these irregularities resulted in ballots being erroneously counted or not counted, the Board's certification of the recount totals was erroneous.

Investigation as to these matters is yet ongoing, and Contestants reserve the right to further supplement this answer as discovery proceeds in this matter.

25. With respect to the allegations in Paragraph 20 of the Notice of Contest, identify and describe precisely and in detail each "obvious error" the local canvassing boards failed to detect and correct and identify by county, precinct and Recount challenge number each ballot affected by such error.

ANSWER: Contestants presently lack information sufficient to answer this Interrogatory. Contestants' counsel and Contestee's counsel have served numerous subpoenas and data practices requests on election officials throughout the State of Minnesota; however, few responses have yet been received. Moreover, because the Panel has not yet appointed any inspectors pursuant to Minnesota Statutes § 209.06 or established procedures for inspection of election materials and ballots, Contestants have been unable to fully investigate this matter thoroughly. Investigation as to these matters is therefore yet ongoing, and Contestants reserve the right to further supplement this answer as discovery proceeds in this matter.

26. With respect to Paragraph 5a of the relief section of the Notice of Contest, identify by precinct and voter name each "Ballot[] and vote[]" that you allege should have been but was not counted in the Recount.

ANSWER: Objected to as duplicative; no further answer needed; see Answers to Interrogatories above. Contestants presently lack information sufficient to fully answer this Interrogatory. Contestants' counsel and Contestee's counsel have served numerous subpoenas and data practices requests on election officials throughout the State of Minnesota; however, few responses have yet been received. Moreover, because the Panel has not yet appointed any inspectors pursuant to Minnesota Statutes § 209.06 or established procedures for inspection of election materials and ballots, Contestants have been unable to fully investigate this matter thoroughly. Investigation as to these matters is therefore yet ongoing, and Contestants reserve the right to further supplement this answer as discovery proceeds in this matter.

27. With respect to Paragraph 5b of the relief section of the Notice of Contest, identify by county, precinct and voter name each "Ballot[] and vote[]" that you allege should not have been but was counted in the Recount.

ANSWER: Objected to as duplicative; no further answer needed; see Answers to Interrogatories above. Contestants presently lack information sufficient to fully answer this Interrogatory.

28. Identify each person you intend to call or may call as an expert witness at trial and, with respect to each such person, state:

- a. Each subject matter(s) on which he/she is expected to testify;
- b. The substance of the facts and opinions to which he/she is expected to testify;
- c. A summary of the grounds for each opinion, including the specific data upon which the opinion will be based;
- d. Whether he/she has prepared any reports or documents summarizing the substance of the facts and opinions to which he/she is expected to testify; and
- e. His/her qualifications in each subject matter about which he/she is expected to testify, including, but not limited to, his/her educational and training background and any employment or other experience that relates to the subject matter of his/her expected testimony.

ANSWER: Contestants will provide the information requested by the Court's Scheduling Order at the time it is required to be provided.

29. Identify each person you intend to call or might call as a witness at trial, and provide a summary of each person's anticipated testimony.

ANSWER: Contestants object to this Interrogatory as calling for information protected by the work product doctrine. Without waiving this objection, Contestants are willing to agree to a mutual exchange of such information on a day by day basis.

30. Identify by date, author, and subject each document that you intend to or might introduce as evidence at trial that is not a public record that has also been made available to Contestee. This is intended to include all charts, summaries, compilations, or calculations based on public records.

ANSWER: Contestants presently lack information sufficient to answer this Interrogatory. Contestants' counsel and Contestee's counsel have served numerous subpoenas and data practices requests on election officials throughout the State of Minnesota; however, few responses have yet been received. Moreover, because the Panel has not yet provided procedures for inspection of election materials and ballots, and because the Panel has not yet appointed any inspectors pursuant to Minnesota Statutes § 209.06, Contestants have been unable to fully investigate this matter thoroughly. The evidence to be presented at trial in this matter consists largely of original election materials and ballots from county election officials. Contestants are willing to agree to a mutual exchange of exhibits or exhibit lists.

RESPONSES TO REQUESTS FOR PRODUCTION OF DOCUMENTS

31. Please produce all documents identified in your responses to these Interrogatories.

RESPONSE TO REQUEST NO. 1: Contestants cannot provide such documents because they do not currently possess the same. See answer to Interrogatory Number 30 above.

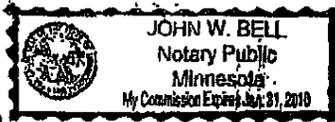
32. Please produce all documents relating to any claim articulate in your Notice of Contest, whether or not you intend to introduce them at trial, and for each (or each subset) identify the specific claim or claims to which it relates.

RESPONSE TO REQUEST NO. 2: Contestants cannot provide such documents because they do not currently possess the same. See answer to Interrogatory Number 30 above.

[This space intentionally left blank.]

AS TO ANSWERS:

Dated: January 19, 2009



Cullen Sheehan
Cullen Sheehan

Subscribed to and sworn before
this 19 day of JANUARY, 2009.

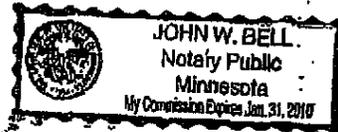
John W. Bell
NOTARY PUBLIC

Dated: January 19, 2009

Norm Coleman
Norm Coleman

Subscribed to and sworn before
this 19 day of JANUARY, 2009.

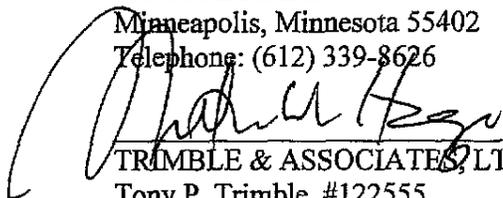
[Signature]
NOTARY PUBLIC



AS TO OBJECTIONS:

Dated: January 19, 2009

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EXHIBIT A-1

**CHALLENGED BALLOTS WHICH THE BOARD CERTIFIED IN ERROR
DUE TO ERRONEOUS ALLOCATION BY SECRETARY OF STATE**

County	Precinct Name	Chall. Ballot #
Benton	Sauk Rapids P-1	2
Crow Wing	Red Precinct	2
Hennepin	St Louis Park W-3 P-12	2
Hennepin	St Louis Park W-3 P-12	3
Hennepin	St Louis Park W-3 P-12	4
Hennepin	St Louis Park W-4 P-14	1
Hennepin	Minnetonka W4 PB	3
Hennepin	Minnetonka W4 PB	4
Hennepin	Minnetonka W4 PB	6
Hennepin	Minnetonka W- 4C P1 (no PC precinct)	1
Hennepin	Hennepin Saint Louis Park—W1 P4	2
Ramsey	White Bear Lake P4	37
Scott	Spring Lake Twp	4
Wadena	Wadena Twp	1

Investigation of these matters is ongoing. Contestants reserve the right to further supplement this answer as discovery proceeds in this matter.

EXHIBIT A-2**BALLOTS WHERE THE BOARD ERRED AS TO VOTER INTENT**

County	Precinct Name	Chall. Ballot #
Anoka	Anoka, W2 P2	2
Benton	Town of Langola	1
Benton	Sauk Rapids P-1	2
Big Stone	Odessa City	1
Blue Earth	City of Mapleton	8
Carver	Victoria P2	9
Dakota	Apple Valley P5	4
Dakota	Burnsville P10	1
Dakota	Burnsville P17	1
Dakota	Eagan P4	1
Dakota	Eagan P12	1
Dakota	Inver Grove Heights P7	2
Dakota	Inver Grove Heights P9	1
Dakota	South St. Paul P2 W1	1
Douglas	Miltona	2
Hennepin	Minneapolis W7 P8	3
Hennepin	Minneapolis W8 P4	2
Hennepin	Minneapolis W13 P8	2
Hennepin	Plymouth W3 P15	2, 6
Hennepin	Plymouth W4 P20	1
Hubbard	Lakeport Twp	1
Lake	Unorganized Territory #2	1
Le Sueur	Le Center City	28
Le Sueur	Waterville City	14
Mahnomen	Waubun	1
St. Louis	Duluth P16	2
Stearns	Town of Brockway	1
Washington	Oakdale P2	19
Washington	Stillwater W3 P7	88
Wright	City of Annandale	2
Wright	City of Cokato	6

Investigation of these matters is ongoing. Contestants reserve the right to further supplement this answer as discovery proceeds in this matter.

EXHIBIT B

**PRECINCTS ERRONEOUSLY ALLOCATED BY SECRETARY OF STATE AND
CERTIFIED BY THE BOARD**

COUNTY/PRECINCT	CERTIFICATION ERROR
Blue Earth - Pemberton	Coleman total should be 48, not 47
Dakota - Apple Valley P14	Coleman total should be 530, not 528
Dakota - Burnsville P4	Franken total should be 762, not 763
Scott - Spring Lake township	Coleman total should be 1327, not 1325
Hennepin - Minneapolis W5, P5	Franken total should be 928, not 932
Hennepin - St. Louis Park, W2, P9	Franken total should be 1308, not 1309
Isanti - Wyanett Township	Franken total should be 367, not 368

Investigation of these matters is ongoing. Contestants reserve the right to further supplement this answer as discovery proceeds in this matter.

EXHIBIT C-1

PRECINCTS WHERE DOUBLE COUNTING OCCURRED DUE TO DUPLICATE/ORIGINAL PROBLEM

<u>COUNTY</u>	<u>PRECINCT</u>	<u>NUMBER OF BALLOTS POTENTIALLY AT ISSUE</u>
Anoka	Coon Rapids W1-P4	6
Blue Earth	Mankato P11	1
Dakota	Eagan P3	7
Dakota	Farmington P1	5
Dakota	Hastings W1-P3	8
Dakota	Lakeville P9	1
Hennepin	Bloomington W2-P27	7
Hennepin	Hopkins P1	1
Hennepin	Minneapolis W2-P3	2
Hennepin	Minneapolis W2-P5	4
Hennepin	Minneapolis W3-P5	4
Hennepin	Minneapolis W5-P4	3
Hennepin	Minneapolis W5-P6	2
Hennepin	Minneapolis W7-P6	12
Hennepin	Minneapolis W7-P7	9
Hennepin	Minneapolis W8-P10	2
Hennepin	Minneapolis W8-P7	11
Hennepin	Minneapolis W9-P2	6
Hennepin	Minneapolis W10-P10	40
Hennepin	Minneapolis W10-P2	11
Hennepin	Minneapolis W10-P4	5
Hennepin	Minneapolis W10-P7	1
Hennepin	Minneapolis W11-P7	10
Hennepin	Minneapolis W11-P8	23
Hennepin	Minneapolis W12-P8	14
Hennepin	Minneapolis W13-P1	3
Hennepin	Minneapolis W13-P3	1
Hennepin	Robbinsdale W4	1
Hennepin	St. Louis Park W3-P12	1
Lake of the Woods	3B (Williams City)	1
St. Louis	Cedar Valley	1
St. Louis	Duluth P4	2
St. Louis	Gnesen	1
Stearns	Melrose	1
Wadena	Wadena P3	1
Wadena	Aldrich City	1
Wright	Buffalo P2	1
Wright	Maple Lake Twp	4

Investigation of this matter is ongoing. Contestants reserve the right to further supplement this answer as discovery proceeds in this matter.

EXHIBIT C-2

**PRECINCTS WHERE BALLOTS WERE NOT COUNTED DURING THE RECOUNT
DUE TO SECRETARY OF STATE INTERPRETATION OF RULE 9**

<u>COUNTY</u>	<u>PRECINCT</u>	<u>NUMBER OF BALLOTS POTENTIALLY AT ISSUE</u>
Anoka	Spring Lake Park 1A	3
Dakota	Burnsville P11	1
Dakota	Farmington P1	1
Dakota	Lakeville P10	11
Hennepin	Bloomington W4-P6	9
Hennepin	Brooklyn Park WE-P8	1
Hennepin	Edina P11	4
Hennepin	Maple Grove P6	3
Itasca	Comfort	1
Ramsey	Roseville P2	1
St. Louis	Duluth P16	1
St. Louis	Hermantown P3	3

Investigation of this matter is ongoing. Contestants reserve the right to further supplement this answer as discovery proceeds in this matter.

EXHIBIT D

PRECINCTS WITH MORE BALLOTS COUNTED THAN PERSONS VOTING ON ELECTION NIGHT; CHAIN OF CUSTODY QUESTIONS

COUNTY	PRECINCT	NUMBER OF BALLOTS MORE COUNTED IN RECOUNT THAN ELECTION NIGHT
Anoka	Lexington P1	1
Becker	Callaway	5
Becker	Shell Lake Twp	7
Beltrami	Turtle Lake Twp	1
Dakota	West St Paul W-1 P-2	7
Hennepin	Crystal W4, P2	6
Hennepin	Golden Valley P6	22
Hennepin	Maple Grove P9	3
Hennepin	Rogers P1	5
Olmsted	Rochester W3 P3	9
Olmsted	Rochester W6 P1	9
Ramsey	Roseville P8	4
Ramsey	Maplewood P6	168
Ramsey	White Bear Twp P2	30
St. Louis	Duluth P32	64
St. Louis	Eveleth P6	3
Swift	Murdock	3
Washington	Woodbury P3	3
Wright	Buffalo P2	5

Investigation of this matter is ongoing. Contestants reserve the right to further supplement this answer as discovery proceeds in this matter.

EXHIBIT E

COUNTIES/PRECINCTS WITH FEWER BALLOTS COUNTED THAN PERSONS VOTING ON ELECTION NIGHT

<u>COUNTY</u>	<u>PRECINCT</u>	<u>NUMBER OF BALLOTS POTENTIALLY AT ISSUE</u>
Clay	Hawley Township	20
Dakota	Burnsville P7	14
Faribault	Blue Earth W2	1
Ramsey	Roseville P4	20
Ramsey	White Bear Lake W3 P1	11
Scott	Prior Lake P5	2 (ballots missing during post-election audit review process but not explained)
Stearns	St. Cloud W1 P2	8

Investigation of this matter is ongoing. Contestants reserve the right to further supplement this answer as discovery proceeds in this matter.

EXHIBIT F

PRECINCTS WITH OTHER IRREGULARITIES DURING THE RECOUNT

<u>COUNTY</u>	<u>PRECINCT</u>	<u>DESCRIPTION</u>
Anoka	St. Francis P2	2 ballots not counted in recount – no apparent explanation
Carlton	Perch Lake Township	Ballots found with chain of custody issues
Hennepin	Bloomington W3-P18	2 Coleman ballots not counted today
Hennepin	St. Anthony	Ballot found in "excess ballot" pile and counted during recount – chain of custody issue
Houston	Caledonia, P1 and P2	2 ballots from P2 found with ballots from P1, but not counted in recount for P2
Stearns	Maine Prairie Township/ Le Sauk Township	3 write ins on a ballot in Maine Prairie Township - same names and handwriting as a ballot in Le Sauk Township (may be double vote)
Stearns	St. Cloud W1, P2	3 ballots apparently removed from ballots voted on election night by election judge
Stearns	St. Cloud W4, P8	2 ballots apparently removed from ballots voted on election night by election judge
Stearns	Waite Park P2	1 ballot apparently removed from ballots voted on election night by election judge

Contestants reserve the right to further supplement this answer as discovery proceeds in this matter.

KNAAK & KANTRUD, P.A.
Attorneys at Law

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November 18, 2008

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Saint Paul, MN 55155

Minnesota Judicial Center
Associate Justice G. Barry Anderson
25 Rev. Martin Luther King Jr. Blvd.
Saint Paul, MN 55155

Ramsey County Courthouse
Assistant Chief Judge Edward J. Cleary
15 W Kellogg Blvd. Room 1550
Saint Paul, MN 55102

Minnesota Judicial Center
Chief Justice Eric. J. Magnuson
25 Rev. Martin Luther King Jr. Blvd.
Saint Paul, MN 55155

Ramsey County Courthouse
Chief Judge Kathleen R. Gearin
15 W Kellogg Blvd. Room 1210
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Dear Members of the Minnesota State Canvassing Board:

This letter responds to the "Supplemental Memorandum of the Al Franken for Senate Committee and Al Franken", which was delivered at 11:22 a.m. on Tuesday, November 18, 2008 by Steve Kaplan, counsel to Franken for Senate.

We strongly object to this unfounded, brazen attack on local election officials, without any authority or justification. The Response asserts, with absolutely no evidence of any kind or nature, that "at least 49 of the 87 counties have "failed to canvass every precinct". No detail or other explanation is provided as to how these counties have so failed. Moreover, such objections should have been raised by the Franken committee when these counties held their county canvassing board meetings. Now that these meetings have been held, there is simply no statutory justification for halting the State Canvassing Board's job at today's meeting.

We again reiterate (as contained within our letter of last week and today's memorandum) that the proper forum for any of these assertions is an election contest under Minnesota Statutes Chapter 209. It is worth noting that the two (2) cases which the Franken campaign continues to cite as authoritative in this matter, *In re Anderson*, 119 N.W.2d 1 (Minn.1962) and *In re Contest of School Dist.*, 431 N.W.2d 911 (Minn.Ct.App. 1988), *both* involved election contests, and not canvassing board meetings or administrative recounts. As such, setting aside the accuracy of the

dubious legal arguments raised within the two (2) Franken memoranda, the proper forum to raise such arguments is pursuant to an election contest.

Moreover, we strongly disagree with the Franken campaign's assertion that the Minnesota Attorney General's opinion is incorrect. To the contrary, it is the Franken campaign which proffers tortured interpretations of clear Minnesota law, arguing that an absentee ballot envelope which was rejected for violating objectively clear statutory guidelines for acceptability somehow constitutes a "valid ballot". The fact that the Franken campaign stands on shaky ground at best is that at their sole citation for legal authority for this proposition is to their own prior brief (see page 3 of Supplemental Brief, citing to "Memorandum of Al Franken").

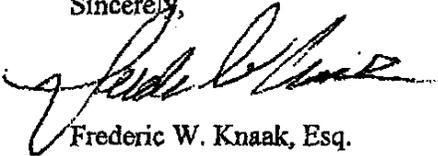
Further, we note the following from the *Bell v. Gannaway*, 303 Minn. 346, 277 N.W.2d 797:

[Minnesota's absentee ballot] laws are not designed to insure a vote, but rather to permit a vote in a manner not provided by common law. As a result, voters who seek to vote under these provisions must be held to a strict compliance therewith. Thus,...the provisions of election laws requiring acts to be done and imposing obligations upon the elector which are personal to him are mandatory. He is personally at fault if he violates them. If his vote is rejected for such violations, it is because of his own fault, not that of election officials. Such provisions prescribe mandatory conditions precedent to the right of voting (emphasis added; citations omitted).

For the foregoing reasons, we strongly request that the Minnesota State Canvassing Board reject the Franken campaign's request to delay certification of the election and thereby delay the recount that election officials in all Minnesota counties have been preparing for and anticipate will commence tomorrow.

We again reiterate our request to be given an opportunity to address the Minnesota State Canvassing Board on this issue at today's meeting.

Sincerely,



Frederic W. Knaak, Esq.

cc: David L. Lillehaug, Esq.
Tony P. Trimble, Trimble & Associates, Ltd.

No. A08-2169

STATE OF MINNESOTA
IN SUPREME COURT

Cullen Sheehan, Norm Coleman, Cara Beth Lindell, and John Doe,

Petitioners,

v.

Mark Ritchie, Minnesota Secretary of State, the Minnesota State Canvassing Board, Isanti County Canvassing Board and Terry Treichel, Isanti County Auditor-Treasurer, individually and on behalf of all County and Local Election Officers and County Canvassing Boards,

Respondents,

and

Al Franken for Senate and Al Franken,

Intervening Respondents.

REPLY MEMORANDUM IN SUPPORT OF AMENDED PETITION

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Attorneys for Petitioners

could call in witnesses, hear evidence, and decide questions of law and fact. *Irrespective* of the [] statutory provision [then in effect], it is quite clear that the question could not properly be decided by the canvassing board.” *Id.* (emphasis added). That today’s statutory scheme may be different does not gainsay the Court’s conclusion regarding the limited authority of a canvassing board.

(2) Recount Duties

The Board’s role with respect to the recount process also is limited. As part of a statewide administrative recount, the Board has the authority to recount “valid ballots” cast in elections for statewide office and to make decisions on challenged ballots. *See* Minn. Stat. § 204C.35, subd. 1. The statutory framework makes clear, however, that the Board may only consider certain information in conducting the recount. Specifically, the scope of the Board’s review is

limited...to the determination of the number of votes validly cast for the office to be recounted. **Only the ballots cast in the election and the summary statements certified by the election judges may be considered in the recount process.**

Minn. Stat. § 204C.35, subd. 3 (emphasis added).

The Administrative Rules further confirm the limited scope of the Board’s review authority: “The scope of an automatic or administrative recount is limited to the recount of the ballots cast and the declaration of the person nominated or elected.” Minn. R. 8235.002. The Secretary of State’s own Recount Guide confirms this commonsense approach:

This is an **administrative** recount held pursuant to M.S. 204C.35 and M.R. 8235. It is **not** to determine who was eligible to vote. It is **not** to determine if campaign laws were

violated. It is **not** to determine if absentee ballots were properly accepted. It is **not** – except for recounting the ballots – to determine if judges did things right. It is simply to physically recount the ballots **for this race!**

See Langdon Aff., Ex. 2 (2008 Recount Guide) at p. 6 (emphasis added). In other words, the Board's job is not to second-guess local election officials. It does not review substantive validity.³

The Board's limited list of duties, as provided by statute and as confirmed by this Court's precedent, obviously does not include an omnibus power to search for, open, verify and recount ballots that were rejected by local election officials. Thus, although the Board does have authority, during the recount process, to evaluate challenges to valid ballots cast in the election, rejected absentee ballot envelopes are not ballots cast in the election and were not certified by any local election officials. In agreeing with this analysis, the Attorney General's Office recently explained as follows:

[T]he rules of the Secretary of State relating to recounts are directed to the recounting of "ballots cast" (Minn. R. 8235.0200) and "voted ballots" (Minn. R. 8235.0300, 8235.0700). Courts that have reviewed this issue have opined that rejected absentee or provisional ballots **are not cast in an election**. . . . This is not to suggest that there is no remedy for the wrongful rejection of absentee ballots. Minn. Stat. Ch. 209 (2008) sets forth the process for an eligible voter or candidate to commence a judicial election contest to

³ The Franken campaign appears to agree. In a brief provided to the Board yesterday, the Franken campaign agreed that the Board has only "ministerial duties" and is without power to consider factual, "incident based" challenges. See 2d Langdon Aff., Ex. A (December 15, 2008 Memorandum Regarding Canvassing Board's Proceedings, at 4). The Franken campaign cites *Hancock v. Lewis*, 265 Minn. 519 (1963), for the proposition that disputes regarding absentee ballots should be considered in an election contest and not in an administrative recount. *Id.*