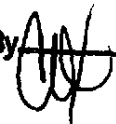


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FILED  
Court Administrator

STATE OF MINNESOTA  
COUNTY OF RAMSEY

FEB 20 2009

By  Deputy

DISTRICT COURT  
SECOND JUDICIAL DISTRICT

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

No. 62-CV-09-56

Cullen Sheehan and Norm Coleman,

Contestants,

**CONTESTEE'S OPPOSITION TO MOTION  
FOR TEMPORARY INJUNCTION**

v.

Al Franken,

Contestee.

Contestee Al Franken opposes Contestants' Motion for Temporary Injunction. The motion flies in the face of a Stipulation and Order freely entered into by the parties and affirmed by the Court. The Stipulation and Order settled and resolved one of Contestants' claims and furthered the strong public policy of ballot secrecy. Contestants' effort to renege on the stipulation they freely entered and eviscerate the binding order of this Court warrants the imposition of sanctions.

**FACTUAL BACKGROUND**

As the Court will recall, Contestants petitioned in the Minnesota Supreme Court to prevent local canvassing boards from opening and counting erroneously rejected absentee ballots. Exhibit F-93. By Order dated December 18, 2008, the Supreme Court granted Contestants' request for relief, and ordered that only absentee ballots agreed to by local election officials and the parties could be opened and counted. Exhibit F-106.

Senator Coleman's representatives participated fully in the process that ensued. The Coleman campaign joined local officials, the Secretary of State, and the Franken campaign in requesting that the Supreme Court amend its December 18 Order to preserve ballot secrecy. In response, the Supreme Court issued an amended order on December 24, 2008.

Senator Coleman's representatives also participated in, and agreed to, the protocol for reviewing rejected absentee ballots. Exhibit F-114. Eventually, the local elected officials and the parties agreed that 933 ballots would be opened and counted by the Secretary of State's Office. However, at the last moment, on December 31, 2008, by Emergency Motion to the Supreme Court, the Contestants tried to stop the process and have it done over. Exhibit F-136. The motion was denied.

On January 3, 2009, at Contestants' insistence, and over Contestee's objection, the ballot envelopes and the ballot themselves were numbered, thereby depriving the 933 voters of the right to a secret ballot. The ballots were opened and counted. Contestee's margin increased by 176 votes. On January 5, 2009, the State Canvassing Board declared the election results. The 933 ballots opened and counted were included in the result.

Contestants filed and served their Notice of Contest the next day. At paragraph 12(d) in the Notice, they alleged that the 933 ballots should not have been opened and counted.

This claim was fully settled and resolved on February 3, 2009. After lengthy negotiations, Contestants and Contestee entered into a Stipulation. The parties agreed that:

1. The two campaigns were parties, along with the Secretary of State and local election officials, to the Protocol of December 24, to comply with and implement the Supreme Court's orders.
2. The 933 ballots were recommended pursuant to the Protocol.

3. The 933 ballots were “properly and lawfully opened and counted,” and the results were “properly and lawfully included in the results of the 2008 United States Senate election as certified by the Minnesota State Canvassing Board.”

4. Contestants “dismiss[ed] with prejudice all claims in the Notice of Contest relating to the 933 Ballots.”

5. “To further Minnesota’s policy of ballot secrecy,” the Minnesota Secretary of State would remove the numbers affixed to the ballot envelopes and ballots.

6. The results of the opening of the 933 ballots “shall be included in the results of the 2008 United States Senate election.”

This Stipulation was agreeable to the Secretary of State, and was “APPROVED AND SO ORDERED” by a unanimous Court.

Two and a half weeks later, Contestants now seek to back out of their Stipulation, and seek equitable relief that directly contradicts the Court’s Order of February 3.

### LEGAL ARGUMENT

Contestants’ motion should be denied. The factors of *Dahlberg Bros. v. Ford Motor Co.*, 137 N.W.2d 314 (Minn. 1965) all require this result:

1. *The relationship between the parties strongly cuts against an injunction.*

The relationship between the parties is governed by the Stipulation and Order of February 3, 2009. Contestants seek to breach the Stipulation, defy the Court Order entered on the stipulation, and make the Court a party to the breach.

2. *Irreparable harm will result if the motion is granted.*

As the Supreme Court recognized in its Order of December 24, 2008, entered at the request of both Contestants and Contestee herein, ballot secrecy is a paramount public policy.

Minnesota law mandates secret ballots. *See* Minn. Stat. § 206.80 (“An electronic voting system may not be employed unless it: (1) permits every voter to vote in secret . . . .”); *see also Application of Andersen*, 119 N.W.2d 1, 8 (1962) (“Procedural statutes governing elections are intended to safeguard the right of the people to express their preference in a free election by secret ballot and to have the results of the election governed by the votes so cast.”); Minn. Stat. § 202A.18 (requiring secret ballots even for caucuses and conventions).

The 933 ballots should never have been numbered. On February 3, 2009, recognizing this public policy, Contestants and Contestee freely entered into a Stipulation that the numbers would be removed.

3. *Contestants will not prevail on the merits.*

This is Contestants’ second, and even more egregious, flip-flop on the 933 ballots. Acting pursuant to a process mandated by the Supreme Court, Senator Coleman’s representatives agreed that each of these ballots should be opened and counted. Only a few days later, the Notice of Contest alleged to the contrary.

As the Court is well aware, the February 3 Stipulation and Order was the product of lengthy negotiations between the parties. One key purpose of the Stipulation and Order was to settle a claim in litigation. Settlement agreements – especially those turned into orders – are highly favored by the courts. *See, e.g., Rice Lake Contracting Corp. v. Rust Environment and Infrastructure, Inc.*, 549 N.W.2d 96 (Minn. App. 1996). A motion to overturn a settlement agreement and order is highly disfavored.

The Stipulation and Order was unambiguous. Contestants’ claim was dismissed with prejudice, and Contestants agreed that the totals from the 933 ballots “shall be included in the results of the 2008 United States Senate election.”

Now Contestants have reversed course yet again. Contestants' stated basis for trying to withdraw from their Stipulation is that they do not approve of the Court's subsequent orders regarding absentee ballots. This is no basis whatsoever for a temporary injunction. Having stipulated that the 933 ballots were properly counted, they cannot now urge – in this case or any other – that those ballots were not properly counted, regardless of what orders have been, or may be, issued. The Stipulation is not “null and void” – it is fully enforceable, and should be enforced against Contestants.

4. *The public interest requires that the February 3 Order be enforced.*

The public has a strong interest in ballot secrecy. It has a strong interest in making sure that when parties in litigation – even former Senators – enter into agreements that are embodied in Court Orders, the stipulations and orders are enforced.

Finally, the public has a strong interest in maintaining its confidence in the judiciary. Contestants' latest strategy is to attack the legitimacy of Minnesota's electoral system and the decisions of this Court. Until now, that strategy has been pursued outside the courtroom through the voice of a spokesperson. Now, the strategy has entered the courtroom, through this motion.


5. *The burden on the Court by this motion is not administrative, but goes directly to the heart of the integrity of the judicial process.*

In the middle of an extraordinarily important, historic, expedited proceeding, the Contestant has burdened the Court with a motion that seeks to abrogate a solemn stipulation and an order of this very Court. This is a direct attack on the integrity of the Court and the entire judicial process.

## CONCLUSION

The motion should be denied.

Contestee advised counsel for the Contestant that this motion is baseless and warrants the imposition of sanctions. Contestee requests that the Court establish a briefing and hearing schedule so that Contestee may bring on a motion under Minn. R. Civ. P. 11 and Minn. Stat. Section 549.211.



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## ACKNOWLEDGMENT

Counsel for Contestee acknowledges that sanctions may be imposed under Minn. Stat. Section 549.211.

