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STATE OF MINNESOTA
COUNTY OF RAMSEY

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,

Court File No. 62-CV-09-56

Cullen Sheehan and Norm Coleman,

**MEMORANDUM IN SUPPORT OF
MOTION FOR TEMPORARY
INJUNCTION**

Contestants,

v.

Al Franken,

Contestee.

INTRODUCTION

Pursuant to Minn. R. Civ. P. 65.02, Contestants seek a temporary injunction preventing the Secretary of State's Office from redacting the envelopes associated with the 933 ballots counted on January 3, 2009. The Court should preserve the status quo until it determines the impact of its February 13, 2009 Order on absentee ballots already counted in the election, including those counted on January 3, 2009.

STATEMENT OF FACTS

On February 3, 2009, Contestants and Contestee stipulated that 933 absentee ballots, which were opened and counted on January 3, 2009 pursuant to a process implemented by the two campaigns and local election officials following the Minnesota Supreme Court's Orders of December 18 and 24, 2008, were "properly and lawfully

opened and counted.” See Feb. 3, 2009 Order re: Absentee Ballots. The Order also directed the Minnesota Secretary of State to “take all necessary steps to remove and/or redact permanently the numbers affixed to the ballot envelopes and ballots on January 3, 2009.” *Id.* at 2.

On February 13, 2009, this Court concluded that certain categories of absentee ballots “are not legally cast under relevant law” and that the Court “shall not order the counting of any of the ballots falling within these categories.” Feb. 13, 2009 Order Following Hearing at 17. Many of the absentee ballots that were among the 933 absentee ballots opened and counted on January 3, 2009 fall into one or more of the categories of ballots that the Court has now ruled are “not legally cast under relevant law and shall not be ordered opened and counted.” *Id.* at 5.

CONTROLLING LEGAL AUTHORITY

A temporary injunction is available under Minn. R. Civ. P. 65.02 when “sufficient grounds exist.” The court is to weigh five factors when determining whether it should issue a temporary injunction:

1. The nature and background of the relationship between the parties preexisting the dispute.
2. The harm to be suffered by plaintiff if relief is denied as compared to that inflicted on defendant if it is granted pending trial.
3. The likelihood that one party or the other will prevail on the merits.
4. The aspects of the fact situation, if any, which permit or require consideration of public policy.
5. The administrative burdens involved in judicial supervision and enforcement.

Metro. Sports Facilities Comm'n v. Minn. Twins P'ship, 638 N.W.2d 214, 221 (Minn. Ct. App. 2002), *rev. denied* (Feb. 4, 2002) (citing *Dahlberg Bros v. Ford Motor Co.*, 137 N.W.2d 314, 321-22 (Minn. 1965)).

ARGUMENT

Contestants seek the requested relief to preserve the status quo until the Court determines the impact of its February 13, 2009 Order on absentee ballots already counted in the election.

I. The Relationship Between The Parties Favors Issuance Of An Injunction

The parties are involved in an election contest to determine which party received the highest number of legally cast votes and is therefore entitled to receive the certificate of election. Which votes are in fact legally cast is at the very heart of the matter—and of the Court's charge. Contestants believe the Court must apply its February 13, 2009 Order to absentee ballots previously counted, including those removed from the envelopes at issue here.

II Irreparable Harm Will Result If The Motion Is Not Granted

The Court's February 3, 2009 Order directs the Secretary of State's Office to redact the identifying numbers from the ballot envelopes so that a particular ballot can no longer be tied to the envelope it came in. Without that identifying information, the Court will be unable to determine which ballot was in fact an illegally cast vote and should not be included in the count of legally cast votes, thus removing an important remedy that would be available if the Court applies its February 13, 2009 Order to absentee ballots

that have already been counted.

III. Contestants Are Likely To Prevail On the Merits

To preserve the integrity of the election and to avoid counting illegal votes, the Court is required to apply its February 13, 2009 Order declaring the meaning of Minn. Stat. §§ 203B.12 and 203B.24 not only to the rejected absentee ballots not yet counted but to all absentee ballots cast and counted in the election. The purpose of an election contest is to determine which party received the highest number of legally cast votes. Minn. Stat. § 209.12. While all legal ballots should be counted, *see Johnson v. Trnka*, 277 Minn. 468, 471, 154 N.W.2d 185, 187 (1967), the Court can include only legally cast ballots in the count. If some of the 933 ballots opened and counted on January 3, 2009 were in fact illegal votes, they should not be counted.

The fact that Contestants stipulated to the February 3, 2009 Order does not change the analysis. At the time Contestants agreed to the Stipulation, they reasonably believed that the standards for a legally cast vote would be reflective of the standards allowed by the Supreme Court and accepted by the Canvassing Board in opening the 933 ballots. As a result of the Court's February 13 Order, however, the Court has declared a different standard for determining a legally cast vote, one which renders a substantial portion of those 933 ballots illegally cast.

More importantly, parties cannot agree to render legal a vote that is illegal. *Cf. McCauley v. Michael*, 256 N.W.2d 491, 498 (Minn. 1977) ("A contract which is contrary to the terms and policy of an express legislative enactment is illegal and unenforceable.") (citation omitted); *Ray v. Homewood Hosp.*, 27 N.W.2d 409, 412 (Minn. 1947) ("The

good faith or intention of the parties in entering into such an agreement does not purge it of its illegality.”); *Barna, Guzy & Steffen, Ltd. v. Beens*, 541 N.W.2d 354, 356 (Minn. Ct. App. 1995) (“A contract violating law or public policy is void. When a contract offends a value of great public importance, the principle of freedom of contract must give way.”) (citations omitted). Indeed, no party can stipulate away the Court’s authority—its responsibility—to ensure that all legally cast votes, but only legally cast votes, are counted. Simply put, the stipulation is by its own terms null and void.

In these circumstances, the Court should enter an order directing the Secretary of State not to redact the ballot envelopes pending further order of the Court.

IV. Public Interest Demands That Consistent Standards Be Consistently Applied

The public has a substantial interest in having Minnesota’s election laws applied consistently and fairly. It also has a substantial interest in ensuring that illegally cast votes are not counted in determining which party received the highest number of legally cast votes. Preserving the identifying marks on the envelopes associated with the 933 ballots counted on January 3, 2009 is necessary to assure the public that illegally cast votes will not be counted.

V. Administrative Burden On The Court Is Minimal

Preventing the Secretary of State’s Office from redacting any information from the envelopes associated with the 933 ballots opened and counted on January 3, 2009 pending further order of this Court will not place any ongoing administrative burden on this Court.

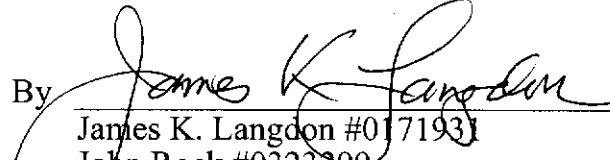
CONCLUSION

For the reasons set forth above, Contestants respectfully request that this Court issue a temporary injunction directing the Secretary of State's Office not to redact any information from the envelopes associated with the 933 ballots opened and counted on January 3, 2009 pending further order of this Court.

Dated: February 20, 2009

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