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STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF RAMSEY	SECOND JUDICIAL DISTRICT

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

Cullen Sheehan and Norm Coleman,

Contestants,

vs.

Al Franken,

Contestee.

**ORDER GRANTING IN PART AND DENYING IN PART CONTESTEE'S CONDITIONAL MOTIONS FOR PARTIAL SUMMARY JUDGMENT**

**FILED**  
**Court Administrator**

Ct. File No. 62-CV-09-56

**FEB 28 2009**

By CWC Deputy

The above-entitled matter came on for hearing before the Court on January 23, 2009, upon Contestee's Conditional Motion for Partial Summary Judgment on Certain of Contestants' Claims and on Contestee's Conditional Motion for Partial Summary Judgment on Certain of Contestee's Counterclaims. Counsel noted their appearances on the record. The Court having heard and read the arguments of counsel, and based upon the files, records, and proceedings herein, makes the following:

**ORDER**

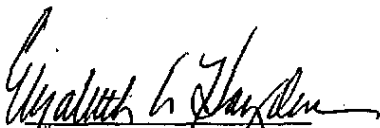
1. Contestee's Conditional Motion for Partial Summary Judgment on Certain of Contestee's Counterclaims is GRANTED IN PART AND DENIED IN PART.
2. The following absentee ballots shall be provided to the Secretary of State at a date to be determined by the Court to be opened and counted at a date to be determined by the Court, and the total be declared and certified for such use as might be

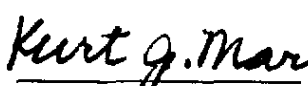
appropriate by the United States Senate, this Court, or any other proper use under law.


Name	County
Jordan Traub	Dakota County
Mary Washington	Dakota County
Bruce Behrens	Goodhue County
Ruth Ann Dressel	Hennepin County
Donald Gleason	Hennepin County
Michele J. Larson	Hennepin County
Gordon Nygren	Hennepin County
John Sullivan-Fedock	Hennepin County
Robert Zelesnikar	Hennepin County
Molly Ritter	Itasca County
Lindsay Thies	Steele County
Brenda Lou Peavie	Washington County

3. Contestee's Conditional Motion for Partial Summary Judgment on Certain of Contestants' Claims is DENIED.
4. Any other relief not specifically ordered herein is DENIED.
5. The attached Memorandum is incorporated herein by reference.

BY THE COURT:

  
 Elizabeth A. Hayden  
 Judge of District Court

  
 Kurt J. Marben  
 Judge of District Court

  
 Denise D. Reilly  
 Judge of District Court

Dated: February 23, 2009

## MEMORANDUM

### I. Introduction

Contestants Cullen Sheehan and Norm Coleman (“Contestants” or “Coleman”) filed a Notice of Contest with the Ramsey County District Court on January 6, 2009 contesting the general election of November 4, 2008 pursuant to Minnesota Statute § 209.021. Contestants seek in part an order directing the recounting and retallying of all ballots cast during the general election. This matter is now before the Court upon Contestee’s Conditional Motion for Partial Summary Judgment on Certain of Contestants’ Claims, and Contestee’s Conditional Motion for Partial Summary Judgment on Certain of Contestee’s Counterclaims.

The Court has been charged with the weighty responsibility of considering the dispute before it in accordance with the laws of the United States and the State of Minnesota while being ever mindful of the overarching goal of ensuring the parties and the people of Minnesota a fair and transparent process. Indeed, “[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). This is a responsibility the Court does not take lightly.

The Minnesota Supreme Court has long recognized that “the right to vote is considered fundamental under both the U.S. Constitution and the Minnesota Constitution.” *Kahn v. Griffin*, 701 N.W.2d 815, 830 (Minn. 2005)(citing *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966); *Ulland v. Growe*, 262 N.W.2d 412, 415 (Minn. 1978)); see also *Harman v. Forssenius*, 380 U.S. 528, 537 (1965)(holding the right to vote to be fundamental because “preservative of all rights”).

“A State indisputably has a compelling interest in preserving the integrity of its election process.” *Purcell*, 549 U.S. at 4 (citing *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989)). Recently, the Minnesota Supreme Court recognized that “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 730 (Minn. 2003)(quoting *Burson v. Freeman*, 504 U.S. 191, 199 (1992)(quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)). The Court also recognizes there is a “strong public policy in favor of finality in elections.” *McNamara v. Office of Strategic and Long Range Planning*, 628 N.W.2d 620, 631 (Minn. Ct. App. 2001)(citing *Greenly v. Independent Sch. Dist. No. 316*, 395 N.W.2d 86, 91 (Minn. Ct. App.1986)).

## II. Summary Judgment Legal Standard

Rule 56 of the Minnesota Rules of Civil Procedure is designed to implement the stated purpose of the rules – securing a just, speedy, and inexpensive determination of an action – by allowing a court to dispose of an action on the merits if there is no genuine dispute regarding the material facts, and a party is entitled to judgment under the law applicable to such facts. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

Accordingly, summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law. Minn. R. Civ. P. 56.03. Summary judgment is not intended as a substitute for trial when there are factual issues to be determined. *Naegele*

*Outdoor Advertising Co. of Minneapolis v. City of Lakeville*, 532 N.W.2d 249, 252 (Minn. Ct. App. 1995). Summary judgment is a “blunt instrument” and “should be employed only where it is perfectly clear that no issue of fact is involved, and it is neither desirable, nor necessary to inquire into facts which clarify the application of the law.” *Donnay v. Boulware*, 144 N.W.2d 711, 716 (Minn. 1966).

In considering a summary judgment motion, the court must determine whether there are genuine issues of fact. *Pine Island Farmers Co-op v. Erstad & Reimer*, 649 N.W.2d 444, 447 (Minn. 2002); *DLH, Inc.*, 566 N.W.2d at 70. The substantive law identifies which facts are material. *Bond v. Commissioner of Revenue*, 691 N.W.2d 831, 836 (Minn. 2005). A material fact is one that will affect the outcome or result of a case. *Laska v. Anoka County*, 696 N.W.2d 133, 140 (Minn. Ct. App. 2005).

The burden is on the moving party to show the absence of any genuine issue of material fact. Minn. R. Civ. P. 56.03; *Bixler v. J.C. Penney Co.*, 376 N.W.2d 209, 215 (Minn. 1985). Once the moving party has made a prima facie case that entitles it to summary judgment, the burden shifts to the nonmoving party to produce specific facts that raise a genuine issue for trial. *Bebo v. Delander*, 632 N.W.2d 732, 737 (Minn. Ct. App. 2001)(citing Minn. R. Civ. P. 56.05; *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988)). The party resisting summary judgment must do more than rest on mere averments or unsupported allegations, but must come forward with specific facts to satisfy its burden of production. *Bebo*, 632 N.W.2d at 737; *DLH, Inc.*, 566 N.W.2d at 71; *Hunt v. IBM Mid-Am. Employees Fed. Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986)(“In order to successfully oppose a motion for summary judgment, a party cannot rely upon mere general statements of fact but rather must demonstrate at the time the

motion is made that specific facts are in existence which create a genuine issue for trial.”); Minn. R. Civ. P. 56.05. In analyzing a motion for summary judgment, the court views the evidence in the light most favorable to the party opposing the motion. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

### **III. The Minnesota Legislature Mandated Conditions and Procedures for Absentee Ballot Voting**

The Minnesota Supreme Court has held that “[t]he opportunity of an absentee voter to cast his vote at a public election by mail has the characteristics of a privilege rather than of a right.” *Erlandson*, 659 N.W.2d at 733, n. 8 (quoting *Bell v. Gannaway*, 227 N.W.2d 797, 802 (Minn. 1975)). As such, “the legislature may mandate the conditions and procedures for such voting.” *Id.* A citizen who exercises this privilege can register and vote, by the terms of the law, “only by complying with the provisions thereof,” *Bell*, 227 N.W.2d at 803, which are currently codified in Minn. Stat. 203B.02. *See also Matter of Contest of School Dist. Election Held on May 17, 1988*, 431 N.W.2d 911, 915 (Minn. Ct. App. 1988).

Minnesota law enumerates four specific grounds upon which an election judge may reject an absentee ballot based on the ballot’s return envelope. The relevant statute provides that “[t]wo or more election judges shall examine each return envelope and shall mark it accepted or rejected in the manner provided in this subdivision.” Minn. Stat. § 203B.12, subd. 2. The statute further provides that:

The election judges shall mark the return envelope “Accepted” and initial or sign the return envelope below the word “Accepted” if the election judges or a majority of them are satisfied that:

- (1) the voter's name and address on the return envelope are the same as the information provided on the absentee ballot application;

(2) the voter's signature on the return envelope is the genuine signature of the individual who made the application for ballots and the certificate has been completed as prescribed in the directions for casting an absentee ballot, except that if a person other than the voter applied for the absentee ballot under applicable Minnesota Rules, the signature is not required to match;

(3) the voter is registered and eligible to vote in the precinct or has included a properly completed voter registration application in the return envelope; and

(4) the voter has not already voted at that election, either in person or by absentee ballot.

There is no other reason for rejecting an absentee ballot. In particular, failure to place the ballot within the security envelope before placing it in the outer white envelope is not a reason to reject an absentee ballot.

...

If all or a majority of the election judges examining return envelopes find that an absent voter has failed to meet one of the requirements prescribed in clauses (1) to (4), they shall mark the return envelope "Rejected," initial or sign it below the word "Rejected," and return it to the county auditor.

*Id.* The statute is explicit that "[t]here is no other reason for rejecting an absentee ballot" beyond these four enumerated reasons. *Id.*

The statutory framework created by the Minnesota legislature is designed in part to prevent election fraud. There are no allegations of fraud in this Election Contest. But even where evidence of fraud is lacking, an election court may not disregard the intention of the legislature to incorporate anti-fraud provisions into the elections law. The United States Supreme Court recently considered the constitutionality of an Indiana statute requiring citizens voting in person on Election Day or participating in early voting to present photo identification issued by the government (the "Voter ID Law"). *Crawford v. Marion County Election Bd.*, 128 S.Ct. 1610 (2008). The *Crawford* Court noted that:

The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history. Moreover, petitioners argue that provisions of the Indiana Criminal Code punishing such conduct as a felony provide adequate protection against the risk that such conduct will occur in the future. It remains true, however, that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists, that occasional examples have surfaced in recent years, and that Indiana's own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor -though perpetrated using absentee ballots and not in-person fraud-demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election.

*Id.* at 1619. The Court held there was "no question" that the State had an interest in "counting only the votes of eligible voters" and in the "orderly administration and accurate recordkeeping" of elections, and concluded: "[w]hile the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Id.* With Chapter 209, the Minnesota legislature indicated its preference for in-person voting and accordingly set a high bar for voting by absentee ballot. Whether the purpose behind this was due to the increased risk of fraud in voting by absentee ballot or for the administrative burden imposed on the State is not for this Court to challenge. It is the role of this Court to apply the law to the facts of the case before it, and not to re-write the requirements imposed by the legislature.

**IV. Contestee's Motion for Partial Summary Judgment on Certain of Contestee's Counterclaims is Granted In Part and Denied in Part**

**a. Relevant Factual Background**

On Election Day, approximately 280,000 Minnesota citizens voted by absentee ballot. Of these, election officials rejected roughly 12,000 absentee ballots. During the recount by the Canvassing Board, Coleman filed a lawsuit challenging the



manner in which local election officials were determining which absentee ballots would be opened and counted. On this issue, the Minnesota Supreme Court ruled:

Because previously rejected absentee ballots that all agree were rejected improperly should be counted, and in light of the fact that the State Canvassing Board has not yet certified the final results of the recount, we order candidates Norm Coleman and Al Franken and their campaign representatives, the Secretary of State, and all county auditors and canvassing boards to establish and implement a process, as expeditiously as practicable, for the purpose of identifying all absentee ballot envelopes that the local election officials and the candidates agree were rejected in error. The local election officials shall identify for the candidates' review those previously rejected absentee ballot envelopes that were not rejected on any of the four bases stated in Minn.Stat. § 203B.12 (2006), or in Minn. Stat § 203B.24 (2006) for overseas absentee ballots. Any absentee ballot envelopes so identified that the local election officials and the candidates agree were rejected in error shall be opened, the ballot shall be counted, and its vote for United States Senator added to the total votes cast for that office in that precinct.

*Coleman v. Ritchie*, 758 N.W.2d 306, 308 (Minn. 2008); *Affidavit of Kevin J. Hamilton* ¶ 2 ("Hamilton Aff."), Exs. A, B & C. Local election officials reviewed the unopened absentee ballots and determined there were approximately 1,350 unopened absentee ballots from 60 counties that were likely rejected in error. *Hamilton Aff.* ¶ 4. In accordance with the Minnesota Supreme Court's Order, the campaigns were given the opportunity to object to these ballots. *Id.* at Ex. C. Ultimately, the campaigns agreed to open and count 933 of the identified rejected absentee ballots. *Id.* at ¶ 5. The absentee ballot return envelopes that local election officials and both candidates agreed were rejected in error were delivered to the Secretary of State and opened and counted on January 3, 2009.

Contestee filed his motion for summary judgment on January 21, 2009, seeking partial summary judgment on certain of Contestants' claims and partial summary judgment on certain of Contestee's counterclaims. With respect to his counterclaims,

Contestee argues that rejected absentee ballots falling into one of two categories of absentee ballots must be opened and counted: absentee ballots ostensibly rejected for date mismatches, and absentee ballots that do not fall within one of the four reasons set forth in section 203B.12 yet remain uncounted.

**b. Absentee Ballots Rejected for Date Mismatches**

Contestee filed an Answer and Counterclaims with the Ramsey County District Court Administrator on January 12, 2009, raising the following allegation in his First Counterclaim:

Although Franken agreed with local election officials that many of the absentee ballots on the list of 1,346 ballots were obviously erroneously rejected, Coleman's campaign objected to the opening and counting of many such ballots. In Duluth, in St. Louis County, Coleman refused to allow 35 absentee ballots, identified below, to be counted solely because the dates of the signatures of the voter and witness were not the same.

*Counterclaim ¶ 3.* Contestee identified 35 absentee ballots allegedly rejected based upon mismatched dates. *Id. Ex. C; see also Hamilton Aff. ¶ 5 and Ex. Q.*

As discussed, Minnesota law sets forth four bases upon which an election judge may reject an absentee ballot based upon the face of the absentee ballot return envelope. The statute is silent as to the date on which the return envelope is dated by either the voter or the witness.<sup>1</sup> The statute is clear that "[t]here is no other reason for rejecting an absentee ballot." Minn. Stat. § 203B.12, subd. 2. Minnesota Statute does not empower

<sup>1</sup> See also Minn. Stat. § 203B.07, which governs the form and content of the certifications to be signed by the voter and the witness. Subdivision 3 requires the witness to certify that:

- (1) the ballots were displayed to [the witness] unmarked;
- (2) the voter marked the ballots in [the witness's] presence without showing how they were marked, or, if the voter was physically unable to mark them, that the voter directed another individual to mark them; and
- (3) if the voter was not previously registered, the voter has provided proof of residence [as required by law].

Minn. Stat. § 203B.07, subd. 3. There is no requirement that the witness and the voter date the certifications contemporaneously.

an election judge to reject an absentee ballot return envelope based solely upon a finding that the date signified by the voter differs from the date signified by the witness. The Court can conclude as a matter of law that an absentee ballot return envelope is wrongfully rejected where the sole reason for rejection is a date mismatch and the ballot is otherwise legally cast.

As of the date of this Order, the Court is without sufficient information to determine whether the 35 absentee ballot return envelopes submitted by Contestee have been legally cast.<sup>2</sup> Thus, the Court cannot order these ballots to be opened and counted until it is satisfied that such ballots have been legally cast. This requires a determination by the Court that the ballot was otherwise compliant with Minnesota Statute § 203B.12, subd. 2, that the voter was alive on Election Day, and that the voter did not otherwise vote in person or by another absentee ballot. This type of evidence has not been submitted to the Court for consideration in connection with Contestee's motion for partial summary judgment. Until such evidence is presented, Contestee's motion for partial summary judgment with respect to his First Counterclaim is denied.

**c. Absentee Ballots Rejected for a Reason Not Set Forth in Minnesota Statute Section 203B.12, subdivision 2**

Contestee's motion for partial summary judgment also identifies 99 absentee ballots excluded for a reason not set forth in Minn. Stat. § 203B.12. Contestee's Second Counterclaim alleges:

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<sup>2</sup> The Court reviewed Exhibit C to Contestee's Answer and Counterclaim and copies of the absentee ballot return envelopes attached therewith where the purported reason for rejection was mismatched dates. However, there is insufficient evidence that these ballots are otherwise legally cast. Additionally, the Court has heard testimony that the stated reason for rejection is not necessarily the only reason to reject a ballot. Without more, the Court is unable to grant summary judgment with respect to these ballots.

Franken has identified a large number of absentee ballots that were rejected in error by election judges and local election officials, and which were not included on the list of 1,346 wrongfully rejected absentee ballots created by local election officials, and were not counted as part of the recount.

*Counterclaim ¶ 5; Hamilton Aff. ¶ 7.* Of these, Contestee argues 13 absentee ballots were lawfully cast but not counted even though election officials determined they should be counted and 86 absentee ballots that should have been identified as properly cast during the recount and should have been counted in the recount. Contestee attached declarations and other supporting documentation from each voter in support of their individual claims. Having reviewed the declarations and evidence presented, the Court grants in part and denies in part Contestee's motion.

**i. Certain Voters Have Provided Sufficient Evidence to Show a Right to Relief As a Matter of Law**

Contestee provided individualized evidence with respect to certain voters in support of their individual claims for relief. Having reviewed all of the evidence provided by Contestee in support of his motion, the Court determines that the voters identified below have provided unrebutted evidence that their absentee ballots were legally cast and should be counted. Accordingly, the Court determines that Contestee is entitled to summary judgment with respect to the absentee ballots of the following individuals:

- Robert Zelesnikar of Hennepin County (Hamilton Aff. Ex. F);
- Brenda Lou Peavie of Washington County (Hamilton Aff. Ex. P);
- Jordan Traub of Dakota County (Ans. Ex. D);
- Bruce Behrens of Goodhue County (Ans. Ex. D);

- Mary Washington of Dakota County (Ans. Ex. D);
- Michele J. Larson of Hennepin County (Ans. Ex. D);
- John Sullivan-Fedock of Hennepin County (Ans. Ex. D);
- Molly Ritter of Itasca County (Ans. Ex. D);
- Lindsay Thies of Steele County (Ans. Ex. D);
- Ruth Ann Dressel of Hennepin County (Ans. Ex. D);
- Donald Gleason of Hennepin County (Ans. Ex. D); and
- Gordon Nygren of Hennepin County (Ans. Ex. D).

**ii. Certain Voters Have Not Provided Sufficient Evidence to Show  
a Right to Relief As a Matter of Law**

Upon review of the individualized evidence provided in support of Contestee's motion for summary judgment, the Court determines that it cannot rule at this time and on this evidentiary record that the voters identified below are entitled to judgment as a matter of law. Contestee has not provided sufficient evidence to satisfy the Court that the absentee ballots of the following individuals complied with all of the requirements imposed by Minnesota law or that any failure to comply with the law was not due to fault on the part of the voter but due to official error. The Court refuses to order the opening and counting of any ballot without sufficient evidence that the voter who cast the ballot complied with all relevant statutory requirements (or that any failure to comply was not due to fault on the part of the voter). In refusing to grant summary judgment at this time, the Court makes no determination as to whether the absentee ballots of these voters may be opened and counted at a later date upon submission of additional proof.<sup>3</sup>

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<sup>3</sup> The Court has attempted to identify what evidence it believes is lacking with respect to each voter. Ultimately, it remains the responsibility of the moving party to ensure the sufficiency of the evidence.

- Rebecca Spartz of Dakota County (Hamilton Aff. Ex. D (declaration silent and no other evidence presented that the voter signed and submitted an absentee ballot application with her name, address and genuine signature or that the absentee ballot return envelope was witnessed by a person registered to vote in Minnesota, a notary public or other individual authorized to administer oaths));
- Marjorie Ramstad of Hennepin County (Hamilton Aff. Ex. E (declaration silent and no other evidence presented that voter signed and submitted an absentee ballot application with her name, address and genuine signature or that the absentee ballot return envelope was witnessed by a person registered to vote in Minnesota, a notary public or other individual authorized to administer oaths));
- Hans Petterson of Hennepin County (Hamilton Aff. Ex. G (insufficient evidence presented that the voter signed an absentee ballot application, that the voter was registered and eligible to vote in the precinct, that the witness was a person registered to vote in Minnesota, a notary public or other individual authorized to administer oaths, or that the rejected absentee ballot was the only ballot submitted by the voter during the November 4, 2008 general election or that the voter did not vote in person on Election Day or submit another absentee ballot));
- Leon Lonstein of Carver County (Hamilton Aff. Ex. H (insufficient evidence presented that the voter signed an absentee ballot application, that the voter was registered and eligible to vote in the precinct, that the witness was a person registered to vote in Minnesota, a notary public or other individual authorized to administer oaths, or that the rejected absentee ballot was the only ballot submitted by the voter during the November 4, 2008 general election or that the voter did not vote in person on Election Day or submit another absentee ballot));
- Sarah Read-Brown of Dakota County (Hamilton Aff. Ex. I (insufficient evidence presented that the voter signed an absentee ballot application, that the witness was a person registered to vote in Minnesota, a notary public or other individual authorized to administer oaths, or that the rejected absentee ballot was the only ballot submitted by the voter during the November 4, 2008 general election or that the voter did not vote in person on Election Day or submit another absentee ballot));
- Henry Owen Abel of Ramsey County (Hamilton Aff. Ex. N (insufficient evidence presented that the voter was registered and eligible to vote in the precinct or that the witness was a person registered to vote in Minnesota, a notary public or other individual authorized to administer oaths,));
- David Tushar of Carlton County (Ans. Ex. D (insufficient evidence presented that the voter signed an absentee ballot application, that the voter was registered and eligible to vote in the precinct, or that the rejected absentee ballot was the only ballot submitted by the voter during the November 4, 2008 general election or that the voter did not vote in person on Election Day or submit another absentee ballot));

- Rachel Francis of Dakota County (Ans. Ex. D (insufficient evidence presented that the voter signed an absentee ballot application, that the voter was registered and eligible to vote in the precinct, that the witness was a person registered to vote in Minnesota, a notary public or other individual authorized to administer oaths, or that the rejected absentee ballot was the only ballot submitted by the voter during the November 4, 2008 general election or that the voter did not vote in person on Election Day or submit another absentee ballot));
- Jean Holger of Dakota County (Ans. Ex. D (insufficient evidence presented that the voter signed an absentee ballot application, that the voter was registered and eligible to vote in the precinct, or that the rejected absentee ballot was the only ballot submitted by the voter during the November 4, 2008 general election or that the voter did not vote in person on Election Day or submit another absentee ballot));
- Leonard Ponds of Dakota County (Ans. Ex. D (evidence presented that the absentee ballot envelope was not witnessed by a person registered to vote in Minnesota, a notary public or other individual authorized to administer oaths; insufficient evidence presented that the voter signed and submitted an absentee ballot application with his name, address and genuine signature, or that the rejected absentee ballot was the only ballot submitted by the voter during the November 4, 2008 general election or that the voter did not vote in person on Election Day or submit another absentee ballot));
- Adja Kumba Kaba Ann of Hennepin County (Ans. Ex. D (declaration silent and no other evidence presented that the voter signed an absentee ballot application with her genuine signature or that the absentee ballot return envelope was witnessed by a person registered to vote in Minnesota, a notary public or other individual authorized to administer oaths));
- Elizabeth Davies of Hennepin County (Ans. Ex. D (insufficient evidence presented that the voter signed and submitted an absentee ballot application with her name, address and genuine signature, that the witness was a person registered to vote in Minnesota, a notary public or other individual authorized to administer oaths, or that the rejected absentee ballot was the only ballot submitted by the voter during the November 4, 2008 general election or that the voter did not vote in person on Election Day or submit another absentee ballot));
- Beth Decker of Hennepin County (Ans. Ex. D (insufficient evidence presented that that voter signed and submitted an absentee ballot application with her name, address and genuine signature, that the voter was registered and eligible to vote in the precinct, or that the rejected absentee ballot was the only ballot submitted by the voter during the November 4, 2008 general election or that the voter did not vote in person on Election Day or submit another absentee ballot));

- Heather Modrack of Hennepin County (Ans. Ex. D (declaration silent and no other evidence presented that the voter did not vote in person on Election Day or submit another absentee ballot));
- Mary Nelson of Hennepin County (Ans. Ex. D (declaration silent and no other evidence presented that the voter did not vote in person on Election Day or submit another absentee ballot));
- Noel Nix of Hennepin County (Ans. Ex. D (insufficient evidence presented that the voter signed and submitted an absentee ballot application with his name, address and genuine signature, or that the rejected absentee ballot was the only ballot submitted by the voter during the November 4, 2008 general election or that the voter did not vote in person on Election Day or submit another absentee ballot));
- Nickolas Rapacz of Hennepin County (Ans. Ex. D (evidence presented that the voter was not registered or eligible to vote in the precinct));
- Neal Rootes of Hennepin County (Ans. Ex. D (declaration silent and no other evidence presented that the voter did not vote in person on Election Day or submit another absentee ballot));
- Lauren Schneck of Hennepin County (Ans. Ex. D (insufficient evidence presented that the voter was registered and eligible to vote in the precinct on November 4, 2008, that the voter signed an absentee ballot application with her genuine signature, that the absentee ballot return envelope was witnessed, or that the witness was a person registered to vote in Minnesota, a notary public or other individual authorized to administer oaths, that the voter signed the absentee ballot with her genuine signature, or that the voter did not vote in person on Election Day or submit another absentee ballot ));
- Anthony Seeley of Hennepin County (Ans. Ex. D (insufficient evidence presented that the voter signed an absentee ballot application, that the voter was registered and eligible to vote in the precinct, or that the rejected absentee ballot was the only ballot submitted by the voter during the November 4, 2008 general election or that the voter did not vote in person on Election Day or submit another absentee ballot));
- Rachel Seeley of Hennepin County (Ans. Ex. D (insufficient evidence presented that the voter signed an absentee ballot application, that the voter was registered and eligible to vote in the precinct, or that the rejected absentee ballot was the only ballot submitted by the voter during the November 4, 2008 general election or that the voter did not vote in person on Election Day or submit another absentee ballot));
- Priscilla Wells of Hennepin County (Ans. Ex. D (insufficient evidence presented that the voter signed and submitted an absentee ballot application with her name,



address and genuine signature, that the voter was registered and eligible to vote in the precinct, that the witness was a person registered to vote in Minnesota, a notary public or other individual authorized to administer oaths, or that the rejected absentee ballot was the only ballot submitted by the voter during the November 4, 2008 general election or that the voter did not vote in person on Election Day or submit another absentee ballot));

- Henry Roy of Itasca County (Ans. Ex. D (evidence presented that voter did not sign absentee ballot application; declaration silent and no other evidence presented that the witness was a person registered to vote in Minnesota, a notary public or other individual authorized to administer oaths));
- Dolores Windingstad of Lac qui Parle County (Ans. Ex. D (declaration silent and no other evidence presented that the voter signed an absentee ballot application, or that the witness was a person registered to vote in Minnesota, a notary public or other individual authorized to administer oaths));
- Zachary Kjolsing of Kandiyohi County (Ans. Ex. D (evidence presented that the absentee ballot return envelope was not witnessed by a person registered to vote in Minnesota, a notary public or other individual authorized to administer oaths));
- Jessup Schiks of Kandiyohi County (Ans. Ex. D (declaration silent and no other evidence presented that the absentee ballot return envelope was witnessed by a person registered to vote in Minnesota, a notary public or other individual authorized to administer oaths));
- Angela Norlen of Lake County (Ans. Ex. D (declaration silent and no other evidence presented that the voter did not vote in person on Election Day or submit another absentee ballot));
- Robert Girtz of Morrison County (Ans. Ex. D (declaration silent and no other evidence presented that the voter signed an absentee ballot application with his genuine signature or that the witness was a person registered to vote in Minnesota, a notary public or other individual authorized to administer oaths));
- Gerald Gauster of Ramsey County (Ans. Ex. D (insufficient evidence presented that the voter signed and submitted an absentee ballot application with his name, address and genuine signature, or that the rejected absentee ballot was the only ballot submitted by the voter during the November 4, 2008 general election or that the voter did not vote in person on Election Day or submit another absentee ballot));
- Lorraine Gauster of Ramsey County (Ans. Ex. D (insufficient evidence presented that the voter signed and submitted an absentee ballot application with her name, address and genuine signature, or that the rejected absentee ballot was the only ballot submitted by the voter during the November 4, 2008 general election or that

the voter did not vote in person on Election Day or submit another absentee ballot));

- Lewanne Morphew of Ramsey County (Ans. Ex. D (insufficient evidence presented that the voter signed an absentee ballot application, that the voter was registered and eligible to vote in the precinct, that the witness was a person registered to vote in Minnesota, a notary public or other individual authorized to administer oaths, or that the rejected absentee ballot was the only ballot submitted by the voter during the November 4, 2008 general election or that the voter did not vote in person on Election Day or submit another absentee ballot));
- John Redmond of Ramsey County (Ans. Ex. D (declaration silent and no other evidence presented that the witness was a person registered to vote in Minnesota, a notary public or other individual authorized to administer oaths));
- Barbara Miller of St. Louis County (Ans. Ex. D (insufficient evidence presented that the voter signed an absentee ballot application, that the voter was registered and eligible to vote in the precinct, that the witness was a person registered to vote in Minnesota, a notary public or other individual authorized to administer oaths, or that the rejected absentee ballot was the only ballot submitted by the voter during the November 4, 2008 general election or that the voter did not vote in person on Election Day or submit another absentee ballot));
- Mary Frankot of Washington County (Ans. Ex. D (insufficient evidence presented that the voter signed an absentee ballot application, that the voter was registered and eligible to vote in the precinct, or that the rejected absentee ballot was the only ballot submitted by the voter during the November 4, 2008 general election or that the voter did not vote in person on Election Day or submit another absentee ballot));
- Katie Krafthefer of Washington County (Ans. Ex. D (evidence presented that the voter was not registered and eligible to vote in her precinct));
- Kathryn Simonson of Wright County (Ans. Ex. D (insufficient evidence presented that the voter signed an absentee ballot application, that the voter was registered and eligible to vote in the precinct, or that the rejected absentee ballot was the only ballot submitted by the voter during the November 4, 2008 general election or that the voter did not vote in person on Election Day or submit another absentee ballot));
- Clarice Bredeson of Pope County (Ans. Ex. D (insufficient evidence presented that the voter was registered in her precinct));
- Muriel Elaine Anderson of Ramsey County (Ans. Ex. D (declaration silent that the voter signed an absentee ballot application with her genuine signature or that the voter signed the absentee ballot return envelope with her genuine signature; insufficient evidence presented that the voter was registered in her precinct)); and

- Anna Jin Jorgensen of Rice County (Ans. Ex. D (evidence presented that the voter did not sign the certification)).

**iii. The Court Granted in Part and Denied in Part Petitioner's Motion for Summary Judgment with Respect to Certain Voters**

Many of the absentee ballots identified by Contestee in his motion for summary judgment are identical to those identified by Petitioners. The Court granted Petitioner's motion for summary judgment on February 10, 2009 with respect to certain voters. A number of the ballots were identified by both Contestee and Petitioners in their respective motions for summary judgment. The following names were previously identified in the Court's February 10, 2009 Order on Petitioner's motion for summary judgment as individuals who are entitled to have their votes opened and counted as a matter of law:

- Douglas Stange of Crow Wing County
- Jennifer Bartholomay of Dakota County
- Audrey Verlo of Hennepin County
- Donna Mortenson of Pope County
- Leona Quinlan of Dakota County
- Thomas Quinlan of Dakota County
- Jordan Brandt of Hennepin County
- Hannah Gorski of Hennepin County
- Greg McCool of Hennepin County
- Rebekah Nelson of Hennepin County
- Karen Robitz of Hennepin County
- Deborah Erickson of Kittson County
- Walter Thompson of Ramsey County

- Ross Grandlienard of Washington County
- Ryan Stoa of Winona County
- Richard Haefner of Olmsted County
- Christopher Ludvigson of Lac qui Parle County
- Gerald Ratzlaff of Dakota County
- Joan Ratzlaff of Dakota County

The Court's February 10, 2009 Order further determined that the following individuals had not presented sufficient evidence for the Court to determine as a matter of law that their absentee ballots had been legally cast and should be opened and counted:

- Jeffrey Dustin of Clay County
- Brenda Rengo of Carlton County
- Harold Buck of Dakota County
- Laurence Engebretson of Dakota County
- Caitlin Heinz of Dakota County
- Katie Kaszynski of Dakota
- Mary Koenigsberger of Dakota County
- Christy Revsbeck of Dakota County
- Donald Applebee of Hennepin County
- Donelda Applebee of Hennepin County
- Kourtney Dropps of Hennepin County
- Dennis Erickson of Hennepin County
- Craig Lindquist of Hennepin County
- Michael Misterek of Hennepin County

- Todd Toner of Hennepin County
- Eila Nelson of Lake County
- Josephine Garcia of Ramsey County
- Sophia Hall of Ramsey County
- Alexis Horan of Ramsey County
- Michael Liebig of Ramsey County
- Tempest Moore of Ramsey County
- Catherina Brigham of Ramsey County
- Emma Bruggeman of Ramsey County
- Ursela Cowan of Ramsey County
- John Robertus of Ramsey County
- Phyllis Jarvis of St. Louis County
- Carole Treloar of St. Louis County
- Orin Ottman of Winona County
- Judith Conlow of Pine County

As of the date of this Order, the Court has not received supplemental materials with respect to these voters compelling the Court to open and count their ballots. Nothing in this Order and Memorandum shall be construed as affecting or altering the status of the absentee ballots addressed in the Court's February 10, 2009 Order.

**i. Contestee's Conditional Motion for Partial Summary Judgment on Contestants' Claims Regarding Ballots from Minneapolis Precinct 3-1 Is Denied**

On Election Day, 2,028 citizens voted in Minneapolis 3-1. During the recount, only 1,896 ballots were produced from this precinct. The ballots were in white Tyvek

envelopes marked "2 of 5," "3 of 5," "4 of 5," and "5 of 5." After reviewing the ballots, it became evident that 130 ballots were missing. The white Tyvek envelope marked "1 of 5" was not found. After an investigation, Cynthia Reichert, the Elections Director for the City of Minneapolis and the Assistant City Clerk ("Reichert"), confirmed that the machine tape in this precinct tallied 2,028 ballots and that the number of ballots actually produced was only 1,896. The Minnesota Attorney General, based in part on the Minnesota Supreme Court's decision in *Moon v. Harris*, 142 N.W. 12, 14 (Minn. 1913), and the 2002 Attorney General's Opinion of Minnesota law, advised the Canvassing Board to include the election night returns. The Canvassing Board determined the Election Day returns presented by Reichert were *prima facie* evidence of the vote in Minneapolis Precinct 3-1 and unanimously decided to accept those returns. Contestants' Notice of Contest challenges in part these missing ballots. *See Notice* ¶ 12(c). Contestee moves the Court to dismiss Contestants' claims with respect to Minneapolis Precinct 3-1 on the grounds that the Canvassing Board's decision was correct as a matter of law.

The Court recognizes the line of cases beginning with *Moon v. Harris*, in which the Minnesota Supreme Court held "that the ballots are the primary or the best evidence in a contest of an election, but that to overcome the result of an official canvass by a resort to the ballots it must be shown that they are intact and genuine and have not been tampered with." 142 N.W. 12, 14 (Minn. 1913); *see also Schultz v. Shelp*, 155 N.W. 97, 98 (Minn. 1915)(recognizing "the high probative value of the ballots as evidence" in election contests, but holding "ballots cannot be admitted in evidence until they have been proved intact and genuine, to the full satisfaction of the court.").

Whether the original ballots may be received into evidence is a question of fact for the Court. *McVeigh v. Spang*, 228 N.W. 155, 156 (Minn. 1929)(citing *Moon*, 142 N.W. at 14). With respect to Contestee's motion for partial summary judgment, the Court lacks sufficient evidence at this time to hold as a matter of law that Contestee is entitled to summary judgment on Contestant's claim. *See, e.g., Affidavit of John Rock ¶ 2.*<sup>4</sup>

**j. Conclusion**

For the aforementioned reasons, the Court grants in part and denies in part Contestee's Conditional Motion for Partial Summary Judgment on Certain of Contestee's Counterclaims and denies Contestee's Conditional Motion for Partial Summary Judgment on Certain of Contestants' Claims.<sup>5</sup> Any other relief not specifically ordered herein is denied.

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<sup>4</sup> With this holding, the Court is not establishing a standard of review to be applied to decisions made by state and local canvassing boards.

<sup>5</sup> Contestee also moved for partial summary judgment on 177 absentee ballots that election judges in Maplewood 6 inadvertently failed to count on Election Day. These absentee ballots were discovered in the Maplewood 6 transfer case during the recount and were subsequently opened and counted. Contestants' Notice of Contest initially challenged these 177 absentee ballots. *See Notice ¶ 12(b)*. On January 29, 2009, Contestants indicated they were convinced the chain of custody was protected with respect to those ballots in Maplewood 6 and accordingly withdrew their challenge. Contestee's motion for summary judgment with respect to this claim is therefore denied as moot. The Court will be the ultimate finder of fact with respect to these ballots.