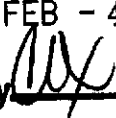


104

STATE OF MINNESOTA
COUNTY OF RAMSEY

FILED
Court Administrator
FEB - 4 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 MOTION TO AMEND
ANSWER AND COUNTERCLAIMS**

v.

Al Franken,

Contestee.

MOTION

Contestee Al Franken moves for leave to amend his Answer and Counterclaims in light of the Court's Order dated February 3, 2009, allowing Contestants to pursue claims involving approximately 4,800 absentee ballots. Specifically, Contestee intends to amend his counterclaims to reflect his continuing review and analysis of the approximately 11,000 rejected absentee ballots. Among other things, Contestee will further refine Exhibit E to the Second Counterclaim, eliminating some ballots and adding others.

GROUND FOR MOTION

1. Rule 15 of the Minnesota Rules of Civil Procedure provides that leave to amend a pleading "shall be freely given when justice so requires." "Unless a party opposing an amendment can establish prejudice, other than having to defend against an additional claim or defense, amendments will be allowed." 1 MINNESOTA PRACTICE: CIVIL RULES ANNOTATED

§ 15.01 (citing *Hughes v. Micka*, 130 N.W.2d 505 (Minn. 1964)). Here, Contestants cannot establish prejudice, and justice requires the amendment for the following reasons.

2. Contestee believed in good faith that Contestants' Notice of Contest claim with respect to absentee ballots was limited to approximately 650 ballots. See Notice of Contest ¶¶ 10-11. Further, Contestee continues to believe that Contestants are barred from pursuing most of their absentee ballot-related claims based on the doctrines of estoppel, laches, waiver, and invited error.

3. Contestee further believed in good faith that Contestants' claims regarding absentee ballots were limited by their failure to answer fully Contestee's Interrogatories.

4. Contestee conditionally pleaded in his Second Counterclaim that public officials erroneously rejected a number of absentee ballots, including those identified in Exhibit E thereto.

5. Contestee did not receive notice until the week of January 19, 2009, that Contestants alleged that approximately 4,800 absentee ballots had been erroneously rejected. Contestants' motion for partial summary judgment was heard on January 23, 2009, only three calendar days before trial. The motion was denied on February 3, 2009.

6. In another Order dated February 3, 2009, which granted in part and denied in part Contestee's motion in limine, the Court allowed Contestants to pursue consideration of the approximately 4,800 ballots. Based on a preliminary review of those ballots, Contestee suspects that many were selected, at least in part, on factors other than the merits. Contestee believes that Contestants' list of approximately 4,800 ballots includes many ballots that should not be opened and counted but excludes others that were erroneously rejected.

7. Since Contestants' motion for partial summary judgment was filed, Contestee has devoted considerable attorney and staff time to reviewing the universe of rejected absentee ballots, including the approximately 4,800 selected by Contestants. This review has been guided

by the Court's rulings and the testimony in open court. Based on this review, Contestee expects to further refine Exhibit E to the Second Counterclaim. Contestee also expects to admit that certain of Contestants' identified ballots should be opened and counted.

8. Accordingly, Contestee requests leave to amend his Answer and Counterclaims with respect to erroneously rejected absentee ballots. Given that Contestants had until just a few days before trial to assert new and expanded claims, Contestee requests that he be allowed to file and serve his amendment at any time up to three business days before he presents his case.

A proposed order is submitted herewith.

Dated: February 4, 2009

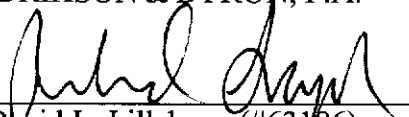
Respectfully submitted,

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ACKNOWLEDGMENT

Contestee acknowledges that sanctions may be imposed under Minn. Stat. §549.211.

