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STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT

Court File 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,

v.

Al Franken,

Contestee.

MEMORANDUM IN SUPPORT OF MOTION FOR AN ORDER DECLARING RECOUNT RULE 9 INVALID AS A MATTER OF LAW

INTRODUCTION

The Secretary of State's Office created Rule 9[1] as a means of ensuring that the parties would have access to the original ballot, rather than the duplicate, because the original ballot was the best evidence of the voter's intent during the recount.[2] Representatives of the Coleman for Senate campaign agreed to Rule 9 under the mistaken assumption that Minnesota precinct judges would precisely follow the requirements of Minn. Stat. § 206.86, subd. 5, as well as training received by such judges from the Minnesota Secretary of State Election Division, and properly label all originals and

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1 Rule 9 was contained within the "Minnesota Secretary of State's Administrative Recount Procedures General Election, November 4, 2008" as adopted by the Minnesota State Canvassing Board on November 18, 2008. *See* Section III, Page 7, *infra*.

2 Minnesota Rule 8235.0800, promulgated under Minn. Stat. § 204C.35 relative to the manual recount process in Minnesota, provides: "The recount official shall open the sealed envelope of ballots and recount them in accordance with Minnesota Statutes, section 204C.22. If a candidate or candidate's representative disagrees with the recount official's determination of whether and for whom the ballot should be counted, the ballot may be challenged." Minn. Stat. § 204C.22 relates to determination of voter intent.

duplicates. Unfortunately, it is now clear that in several precincts throughout the state of Minnesota, including numerous precincts in Minneapolis, the election judges inadvertently failed to mark all of the duplicated ballots, thereby making it impossible to retrieve them and leading to the double-counting of ballots during the Canvassing Board's recount.

Simply put, Rule 9's underlying assumption—that election judges would follow the law—failed. The testimony during this trial of several of Minnesota's most experienced election officials, including Deputy Secretary of State Jim Gelbmann, State Elections Director Gary Poser, Ramsey County Election Director Joseph Mansky and Minneapolis Election Director Cynthia Reichert, evidences beyond any doubt that the counting of original ballots in situations where the number of original ballots exceeded the number of duplicate ballots had the potential to create significant problems in the recount.

Under Rule 9, if the number of originals did not match the number of marked duplicates, the marked duplicates were set aside and only the originals were counted. As the evidence in this trial has demonstrated, a strict application of Rule 9 caused double-counting where the number of originals exceeded the number of marked duplicates. Therefore, adherence to Rule 9 created an inaccurate count and the results of the recount, if not corrected by this Court, are wrong. As a result, Rule 9 must be disregarded by this Court in its determination of which party received the highest number of legally cast votes.

Regardless of the agreement or presuppositions of the campaigns, adherence to

Rule 9, and ratification of such adherence to Rule 9 by this Court, would plainly violate Minnesota election law. Minn. Stat. § 206.86, subd. 5 dictates that only duplicate ballots are run through the machine on election night. Under Minnesota law, the originals for which duplicates were made are not legally cast ballots. Accordingly, in a recount of the ballots cast on election night, recount officials should have counted the duplicate ballots, and not the originals. Neither the Secretary of State's Office nor the parties can abrogate this clear statutory requirement by agreeing to handle the recount another way. For this reason as well, Rule 9 cannot control the disposition of the double-counting claims.

ARGUMENT

I. MINNESOTA LAW SETS FORTH SPECIFIC PROCEDURES FOR THE DUPLICATION OF DAMAGED BALLOTS.

Minnesota law requires the accurate creation of duplicate ballots in circumstances in which the original ballot is unable to be read by the tabulation machines (such as torn and damaged ballots and UOCAVA/overseas ballots). Minnesota law also clearly requires that only the duplicate be counted, while preserving (but not counting) original ballots. Minn. Stat. § 206.86, entitled "Counting Electronic Voting System Results," provides the procedure for the election-night counting of votes where a precinct uses an electronic voting system (emphasis added):

> Subd. 5. Damaged, defective ballot cards. If a ballot card is damaged or defective so that it cannot be counted properly by the automatic tabulating equipment, a true duplicate copy must be made of the damaged ballot card in the presence of two judges not of the same major political party and must be substituted for the damaged ballot card. Likewise, a duplicate ballot card must be made of a defective ballot card which may not include the votes for the offices for which it is defective. Duplicate ballot cards must be clearly labeled "duplicate," indicate the precinct in which the

corresponding damaged or defective ballot was cast, bear a serial number which must be recorded on the damaged or defective ballot card, **and be counted in lieu of the damaged or defective ballot card.**

Minnesota Rules 8230.3850(E), relating to the duplication of ballots, provides as follows (emphasis added):

> E. All original ballots which require duplication must be placed in an envelope marked "ballots for which duplicates were or are to be made." **The duplicate ballot must be placed with the other valid ballots to be tabulated.**

The above statute and Rules establish the definition of a "valid ballot": only the duplicate ballot is a valid and legally cast ballot which was counted by the voting machines on election night. Accordingly, if this Court approves recount results derived from an interpretation of Rule 9 that counted originals and not duplicates in precincts where the number of duplicates and originals did not match, such a finding is wrong, because it will include ballots that were not legally cast.

II. MINNESOTA LAW CREATES A PRESUMPTION THAT DUPLICATE BALLOTS WERE MADE AND COUNTED BY VOTING MACHINES ON ELECTION NIGHT.

Due to the mandatory nature of the statute, which requires duplicates to be created and run through the voting machines on election night, as well as the testimony of the various local election officials on the record in this matter, the presumption should be that where an original ballot is found without a corresponding duplicate ballot, a duplicate ballot was made without having been properly marked and run through the voting machines on election night. *See* Minn. Stat. § 206.86, subd. 5 ("a true duplicate copy *must* be made . . . and *must* be substituted for the damaged ballot card.") (emphasis

added); Minn. R. 8230.3850(E) ("The duplicate ballot **must be placed** with the other valid ballots **to be tabulated**) (emphasis added). Further, the envelopes in which original ballots are placed bear the caption "ballots for which duplicates were or are to be made." Minn. R. 8230.3850(E). There would be no reason for local election officials to mark a ballot "Original" if they did not create a duplicate, whether or not they properly marked the duplicate with the word "Duplicate."[3] Finally, Anoka County elections director Rachel Smith and Minneapolis elections director Cynthia Reichert each testified that, if local election judges make errors with respect to duplicating ballots, the most common error is the failure to properly mark the duplicate ballot.

The presumption that unmarked duplicate ballots exist is especially appropriate in precincts in which the number of ballots counted in the recount exceeds the number of persons voting on election night (both in-person and by absentee) by at least the number of challenged original ballots. During the recount, numerous ballots found in the envelope marked "ORIGINALS FROM WHICH DUPLICATES HAVE BEEN MADE" were challenged by representatives of both the Coleman and Franken campaigns because no corresponding marked duplicate was found within the ballots included in the recount tallies. These challenged ballots from 10 precincts in the City of Minneapolis are part of the record as Exhibits C55, C78, C85, C93, C101, C109, C116, C145, C152 and C159.

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[3] Regardless of whether the votes are to be counted at a central counting center or precinct, the election judges must certify that all ballots requiring duplication were duplicated pursuant to the procedures in Rule 8230.3850 and that the ballots were duplicated are placed in the proper envelope (*i.e.*, that the original, but defective ballots have been retained). *See* Minn. R. 8230.2050; 8230.2150; 8230.4390; 8230.4360.

Additionally, the record in this matter contains the election day pre-registered voter sign-in rosters, same-day registration rosters and UOCAVA rosters, as well as machine tapes from election night, all of which evidence the number of persons actually voting on election night. *See* Exhibits C56-60, C86-90, C94-98, C102-105, C110-113, C117-120, C138-141, C146-149, C153-156 and C160-163. The record in this matter also evidences the number of ballots actually counted during the recount, which numbers were certified by the Minnesota State Canvassing Board. *See* Exhibit C603 (introduced during the testimony of Minnesota Elections Director Gary Poser).

A comparison of these exhibits demonstrates that, in 10 Minneapolis precincts, the number of votes counted during the recount exceeded the number of persons actually casting ballots at those precincts on election night, as follows:

PRECINCT	VOTERS PRESENT	RECOUNT BALLOTS
Minneapolis W11-P8	2857	2873
Minneapolis W12-P8	2923	2936
Minneapolis W10-P2	2079	2087
Minneapolis W11-P7	1996	2004
Minneapolis W7-P7	1849	1865
Minneapolis W9-P2	1712	1718
Minneapolis W10-P4	1193	1197
Minneapolis W2-P5	2102	2104
Minneapolis W8-P10	2214	2217
Minneapolis W13-P1	1916	1921

Where there are more ballots counted in the recount than voters who cast ballots on election day, such excess ballots are illegal and, therefore, cannot be certified by this Court to constitute legally cast ballots. *See Johnson v. Tanka*, 154 N.W.2d 185, 187 (Minn. 1967) (noting that where there are more ballots than voters who voted on election

day, the votes cast over the number of voters "cannot be said to be legal."). "The outcome of an election should rest upon ballots received according to law and should not be determined by illegal votes." *Id.*

III. THE PROCESS UNDER RULE 9 FOR COUNTING ORIGINAL BALLOTS WHEN THE NUMBER OF ORIGINAL AND DUPLICATE BALLOTS DOES NOT MATCH DID NOT COMPLY WITH MINNESOTA LAW.

While Minnesota election law unambiguously creates the requirement that duplicate ballots be made according to the procedures outlined above, and that only duplicate ballots be tabulated and counted on election night, the Minnesota State Canvassing Board ("Board") adopted recount rules proposed by the Minnesota Secretary of State on how to handle a variety of issues during the recount, including how to handle original and duplicate ballots. With respect to the counting of these duplicate and original ballots during the recount, the recount rules provided in part as follows (emphasis added):

> 9. As the Table Official sorts the ballots, he or she shall remove all ballots that are marked as duplicate ballots and place those duplicate ballots in a fourth pile. At the conclusion of the sorting process, the Table Official shall open the envelope of original ballots for which duplicates were made for that precinct *and sort the original ballots in the same manner as they sorted all other ballots.* **The Table Official shall disregard this step if there is not an envelope of original ballots, in which case the duplicate ballots will be sorted.**

When the campaigns agreed to Rule 9, they did so with the understanding that the original ballot would be the best evidence of intent of the voter under Minn. Stat. § 204C.22 and the presumption that local election officials had created duplicate ballots and properly marked all duplicate and original ballots, as required by Minnesota law. Neither their agreement nor Rule 9 can prevent this Court from applying Minnesota law

in the face of clear evidence that Minnesota law was not uniformly followed in the correct marking of duplicate ballots.

First and foremost, it should be noted that Rule 9, on its face, does not mandate that originals for which no marked duplicates were found during the recount should be counted and included in the recount totals. The language relates to "sorting" and not "counting." Thus, Rule 9 complements Minnesota law by enabling a comparison (via "sorting") of the marked original ballots (found in the folder containing originals from which duplicates were made) to the corresponding marked and numbered duplicates.

In an email to all Minnesota election officials dated November 19, 2008 purporting to "clarify" Rule 9, the Minnesota Secretary of States' Office unilaterally stated that only the marked original ballots (located in the folder containing originals from which duplicates were to be made) were to be counted (despite Rule 9's use of the word "sort" rather than the word "count") (emphasis added):

> It is the opinion of our Office that Rule 9 is clear about the process to be used when duplicate ballots are found during the sorting process. Those ballots are to be removed from the sorting process and placed in a separate [sic] pile. If there is an envelope of original ballots, the original ballots should then be sorted. If there are no duplicate ballots found during the sorting process, the canvass board has not authorized the envelope of original ballots to be opened and the original ballots envelope should remain sealed. If no envelope of original ballots exist, the duplicate ballots should then be sorted. While there is no requirement to compare the number of duplicate ballots to the number of original ballots, if there is an apparent significant discrepancy in the numbers, the candidates' representatives should attempt to agree on whether to sort the original or duplicate ballots. **The Deputy recount official shall note on the incident log if the duplicates rather than original ballots were counted.** If the two candidate representatives can not agree, the Deputy Recount Official shall sort and count the original [sic] ballots. I hope this provides additional clarity.

By following this interpretation of Rule 9, if the word "DUPLICATE" with a serial number was not correctly placed at the top of every duplicate, and some (but not all) originals corresponding to those (unmarked) duplicates were found in an envelope containing originals from which duplicates had been made and then counted, the original ballot and the unmarked duplicate ballot corresponding to the same voter were both counted. The attempt to clarify Rule 9 thus resulted in the double-counting of votes during the recount (see chart at Section II, *supra*, relative to representative examples of some, but not all, of the precincts in which double counting occurred during the recount).

Guidance to the counties to remove the duplicate ballots and review original ballots in their place made practical sense when the focus was on voter intent. It was not, however, intended to deal with the fundamental issue of counting, and preventing double-counting. Any argument that the parties' limited agreement related to Rule 9 estops Contestants from bringing their double-counting claims by estoppel is simply wrong, because the Recount Rules also facilitated a challenge process pursuant to which representatives of both campaigns challenged originals ballots for which unmarked duplicates were not located. The existence of these challenged ballots is prima facie evidence that Contestants did not waive any right to challenge Rule 9 as applied during the recount. To the contrary, these challenges constitute assertions by Contestants during the recount of their objections to the results of Rule 9 in these precincts.

Contestants also argued before the Canvassing Board that challenges to original ballots for which corresponding marked duplicates were not located must be upheld to

prevent double-counting. Although at least one member of the Board stated his agreement that double-counting appeared to be a certainty, the Board ultimately determined that this matter was more properly within the jurisdiction of an election contest. The Minnesota Supreme Court also agreed.

The evidence shows that many election officials believed that Rule 9's direction to count only the originals, if the number of originals and marked duplicates could not be reconciled, was flawed. These comments included the following, evidenced in the exhibits identified below:

- "I'm assuming (or maybe I shouldn't be) that we would only recount the ballots in the pile we removed from the transfer case and not use the "original" ballots as a part of the recount. Exhibit C602, Page 00115, City of Maple Grove election official.

- "If the number of duplicate ballots does not match the number of original ballots we will count the duplicated ballots, not the original ballots. Some precincts may have kept the UOCAVA original ballots separate with the UOCAVA envelopes." Exhibit C602, Page 00121, City of Eden Prairie election official.

- "...bad decision. REALLY BAD! URGGGHHHHHHH. Pass it on. This is going to be ugly..." (emphasis in original). Exhibit C602, Page 00122, Hennepin County election official.

- "In my humble opinion, this is a bad rule and an even worse application. There's no good reason to involve the originals in the recount. **We should be counting only what is in the sealed voted ballot boxes.**" Gary Poser's reply is: "I don't disagree – I lost that battle". Exhibit C602, Page 00155, Stearns County Election Official and Minnesota Secretary of State Elections Director.

All of the foregoing clearly and convincingly demonstrate the fatal problem in applying Rule 9 during the recount to count originals in precincts in which the number of originals found exceeded the number of marked duplicates. The result, as reflected in the

record, is double-counting in some precincts. Accordingly, this Court should not certify any results that include precinct counts derived from application of Rule 9 to count originals in precincts in which the number of originals failed to match the number of located duplicates.

Fortunately, the remedy is simple. This Court can simply order that U.S. Senate votes from all original ballots that were challenged for the lack of a corresponding duplicate (copies of which are in evidence) shall be subtracted from the appropriate candidate's vote total. This solution would replicate what occurred on election night (and should have occurred during the recount) and would provide a result that this Court can properly approve in accordance with Minn. Stat. § 206.85, subd. 5 and the requirement under Minn. Stat. § 209.12 to determine which party "received the highest number of votes legally cast at the election."

IV. COURTS PRESENTED WITH THE ISSUE OF NON-MATCHING ORIGINAL BALLOTS HAVE REFUSED TO COUNT SUCH ORIGINALS.

Although Minnesota courts have not addressed this issue specifically, other jurisdictions with similar statutes have concluded that despite the strong public policy that ballots should be counted even where there is a clerical error, original ballots for which duplicates were made should not be counted because to do so would be to "ignore the clear written law on the subject, and create a situation that would authorize procedures that would frustrate the proper handling of ballots and even create methods for fraudulent mischief in the counting of the votes." *Wright v. Gettinger*, 428 N.E.2d 1212, 1223 (Ind. 1981). As an Illinois Court has stated: "The legislature intended to

insure certainty in the matching of duplicate ballots with the damaged original ballots. . . . [T]he language of the statute is mandatory and quite clear. If there were to be exceptions or if the legislature had intended that these procedures be merely directory, it would seem that language to that effect would appear somewhere in the Election Code." *Larson v. Bd. of Educ. of Bement Comm. School Dist. No. 5*, 455 N.E.2d 866, 868 (Ill. App. Ct. 1983).

These statutory requirements "substantially contribute to the integrity of the election process. These requirements are a reasonable means of eliminating opportunities for election fraud and uncertainty." *Id.* "Valid, mandatory statutory provisions that contribute substantially to the integrity of the election process must be enforced by the courts." *Id.* Thus, original ballots for which corresponding marked duplicates were not located should not be counted, even where "there is not even an inference that there was any fraud or mischief" because "the statute provides that when a duplicate is made of an original, that duplicate ballot shall be counted and not the damaged original." *Wright*, 428 N.E.2d at 1222.

V. THE PARTIES CANNOT AGREE TO IGNORE CONTROLLING LAW.

Parties to litigation 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 a statute away. Therefore, any agreement by the parties to adhere to Rule 9, to the extent such Rule violates Minnesota law—as it does here—is by its own terms null and void.

CONCLUSION

For the reasons set forth above, Contestants respectfully request that the Court issue an order (a) declaring Rule 9 as applied during the recount in precincts in which the number of originals exceeded the number of marked duplicates to be invalid as a matter of law and (b) directing that pursuant to Minn. Stat. § 206.86, subd. 5, all ballots in those precincts which were challenged for the lack of a corresponding duplicate shall not be counted in determining which party received the highest number of legally cast votes. For the Minneapolis precincts at issue this simply requires that the double-counted votes be subtracted from the vote total. For the remaining precincts at issue, an inspection should be ordered or the Court should revert to the election night vote totals.

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