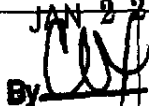


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FILED
Court Administrator

STATE OF MINNESOTA	JAN 22 2009	DISTRICT COURT
COUNTY OF RAMSEY	By  Deputy	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,

ORDER ON CONTESTEE'S MOTION TO DISMISS

Cullen Sheehan and Norm Coleman,

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

Contestants,

vs.

Al Franken,

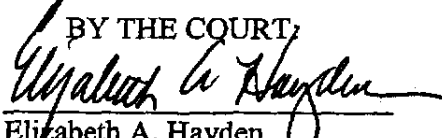
Contestee.

The above-entitled matter came on for hearing before the Court on January 21, 2009 upon a Motion by Contestee Al Franken to Dismiss. 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 Al Franken's Motion to Dismiss is DENIED.
2. Any other relief not specifically provided herein is denied.
3. The attached Memorandum is incorporated herein by reference.

Dated: January 22, 2009

BY THE COURT:

Elizabeth A. Hayden
Judge of District Court

Dated: 1-22-09


Kurt J. Marben
Judge of District Court

Dated: 1/22/09


Denise D. Reilly
Judge of District Court

MEMORANDUM

I. Factual Background

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 as well as the appointment of Inspectors pursuant to Minnesota Statute § 209.06. This matter is now before the Court upon Contestee Al Franken's ("Contestee" or "Franken") Motion to Dismiss the Notice of Contest for lack of subject-matter jurisdiction and for failure to state a claim upon which relief can be granted. In analyzing Contestee's motion to dismiss, the Court is guided by the Constitution of the United States, Minnesota Statute, Chapter 209, and Orders of the Minnesota Supreme Court. For the reasons contained herein, Contestee's motion is denied.

II. Contestee Al Franken's Motion to Dismiss Is Denied

a. The Court Is Vested with Jurisdiction to Hear an Election Contest

i. Motion to Dismiss Legal Standard

When determining an election contest, the court shall proceed in the manner provided for the trial of civil actions "so far as practicable." Minn. Stat. § 209.065. Franken's motion to dismiss is procedurally proper under Rules 12.02 (a) and (e) of the Minnesota Rules of Civil Procedure. *Derus v. Higgins*, 555 N.W.2d 515, 517 n.4 (Minn. 1996). The Minnesota Rules of Civil Procedure allow for dismissal of a suit for "lack of jurisdiction over the subject matter" or for "failure to state a claim upon which relief can be granted." Minn. R. Civ. P. 12.02 (a) & (e). The Court must take all facts alleged in the complaint as true and construe them in the light most favorable to the non-moving party. *Northern States Power v. Franklin*, 122 N.W.2d 26, 30

(Minn. 1963). To survive a motion to dismiss under Rule 12.02(e), a complaint must set forth a legally sufficient claim for relief. *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997). It is immaterial whether or not the plaintiff can prove the facts alleged. *Martens v. Minnesota Min. & Mfg. Co.*, 616 N.W.2d 732, 739 (Minn. 2000). Where a complaint fails to state a claim upon which relief can be granted, dismissal with prejudice and on the merits is appropriate. *Id.* at 748.

ii. The Court's Exercise of Jurisdiction is Constitutional

Article I, Section 5, Clause 1 of the United States Constitution provides that “[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members[.]” U.S. CONST. Art. I § 5, cl. 1. The Minnesota Supreme Court has recognized that this constitutional provision may impose certain limits upon the scope of any review under Chapter 209. *Odegard v. Olson*, 119 N.W.2d 717, 719 (Minn. 1963) (“While the state legislature may regulate the conduct of elections subject to the limitations expressed in U.S. Const. art. I. § 4, it should be conceded that under the provisions of art. I. § 5, each house of Congress is the sole judge of the election returns and qualifications of its members, exclusive of every other tribunal, including the courts.”); *cf. Coleman v. Ritchie*, 758 N.W.2d 306, 310-11 (Minn. 2008) (Page, J. dissenting) (“[T]he scope of an election contest under chapter 209 is primarily concerned with which party received the highest number of votes, not the protection of the fundamental right to vote.”). However, the United States Supreme Court ruled in *Roudebush v. Hartke*, 405 U.S. 15 (1972), that the State’s power under Article I, § 4 to prescribe the times, places and manner of holding elections did encompass the power of a court to order a recount.

In *Roudebush*, the United States Supreme Court noted that:

Unless Congress acts, Art. I. § 4, empowers the States to regulate the conduct of senatorial elections. This Court has recognized the breadth of those powers: ‘It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in

relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.'

Id. at 24 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). The United States Supreme Court went on to hold that "a recount can be said to 'usurp' the Senate's function only if it frustrates the Senate's ability to make an independent final judgment." *Id.* at 25.

Guided by these principles, the panel concludes that the election-contest procedure provided for by Chapter 209 is not unconstitutional and does not usurp the Senate's final authority to judge the qualifications of its members under Article I, § 5. See *McIntyre v. Fallahay*, 766 F.2d 1078, 1086 (7th Cir. 1985) (recognizing in the context of recount under state law that "the state's count and the certificate of election are just advice from the state to Congress. The final decision always is that of the House, no matter who counts the ballots and no matter how many times they are tallied."). Chapter 209 does nothing to limit any independent review by the Senate of the election if it so chooses. Furthermore, the jurisdiction exercised by this panel in this election contest arises from the State's exercise of its constitutional authority to prescribe the time, places and manner of elections in accordance with Article I, § 4 of the Constitution. Cf. *Roudebush*, 405 U.S. at 24. Contestee's motion to dismiss this election contest for lack of subject matter jurisdiction pursuant to Article I, § 5 of the United States Constitution is denied.

iii. The Court Has Jurisdiction Pursuant to Minnesota Statute § 209.12

Contestee also challenges the jurisdiction of this panel to hear the election contest as described in Contestants' Notice of Contest as beyond the scope of the jurisdiction provided to this panel by Minnesota Statute § 209.12. Section 209.12 provides, in relevant part,

When a contest relates to the office of senator or a member of the house of representatives of the United States, the only question to be decided by the court is which party to the contest received the highest number of votes legally cast at the election and is therefore entitled to receive the certificate of election. The judge trying the proceedings shall make findings of fact and conclusions of law upon that question. Evidence on any other points specified in the notice of contest, including but not limited to the question of the right of any person to nomination or office on the ground of deliberate, serious, and material violation of the provisions of the Minnesota Election Law, must be taken and preserved by the judge trying the contest, or by some person appointed by the judge for that purpose; but the judge shall make no findings or conclusion on those points.

Contestee interprets § 209.12 as limiting the scope of this panel's review to the purely ministerial task of ensuring that the tallies from the Canvassing Board are free from mathematical error.

The plain text of § 209.12 provides the Court with the jurisdiction to determine the question of "which party to the contest received the highest number of votes legally cast." The Court's review under § 209.12 of whether votes are "legally cast" is not limited to the purely ministerial task of ensuring that the tallies from the Canvassing Board are free from mathematical error. *See Fitzgerald v. Morlock*, 120 N.W.2d 339 (Minn. 1963) (reviewing an election contest under prior law in which court undertook a manual review of specific ballots to determine if the ballots were "legally cast"). The Court has subject matter jurisdiction to hear this contest under § 209.12.

The Court's conclusion that it has subject matter jurisdiction to hear this election contest is buttressed by the Minnesota Supreme Court Order of January 5, 2009, which states:

The Minnesota legislature has established a two-step statutory procedure for resolving elections, such as this one, in which the difference in the number of votes cast for the candidates is less than one-half of one percent. First, the ballots cast in the election are subject to an automatic recount under Minn. Stat. § 204C.35, subd. 1 (2006). The purpose of the recount is to manually count the undisputed ballots lawfully cast in the election. Second, following the completion of the recount, either party may file an election contest under Minn. Stat. ch. 209 (2006). The purpose of an election contest is to resolve in a judicial forum disputes over, among other things, who received the largest number of votes legally cast in the election. Minn. Stat. § 209.02, subd. 1 (2006).

Coleman v. Ritchie, A08-2169, 2009 WL 20954, *2 (Minn. Jan. 5 2009) (emphasis added). In its Order, the Minnesota Supreme Court expressly declined to consider the merits of the parties' argument with respect to whether absentee ballots had been properly or improperly rejected, and concluded that "[b]ecause the parties and the respective counties have not agreed as to any of these additional ballots, the merits of this dispute (and any other disputes with respect to absentee ballots) are the proper subjects of an election contest under Minn. Stat. ch. 209." *Id*; see also *Coleman v. Ritchie*, 758 N.W.2d 306, 309 (Minn. 2008) (recognizing the possibility of "a subsequent election contest under Minn. Stat. ch. 209 in which a party seeks a determination by the district court as to the propriety of the rejection of absentee ballots . . ."). In these Orders, the Minnesota Supreme Court ruled that certain issues raised by Contestant and Contestee in earlier challenges would be properly heard in an election contest under Chapter 209.

Contestee's motion to dismiss for lack of jurisdiction under Minnesota Statute § 209.12 is denied.

b. Contestants' Notice of Contest Is Sufficient to Withstand a Motion to Dismiss

Assuming the Court has jurisdiction over the matters presented, Contestee moves to dismiss the Notice of Contest on the grounds that Contestants failed to state a claim upon which relief may be granted.

When determining an election contest, the court shall proceed in the manner provided for the trial of civil actions "so far as practicable." Minn. Stat. § 209.065. Contestee's motion to dismiss is procedurally proper under Rules 12.02 (a) and (e) of the Minnesota Rules of Civil Procedure. *Derus v. Higgins*, 555 N.W.2d 515, 517 (Minn. 1996), n. 4. The Minnesota Rules of Civil Procedure allow for dismissal of a suit for "lack of jurisdiction over the subject matter" or for "failure to state a claim upon which relief can be granted." Minn. R. Civ. P. 12.02 (a) & (e).

The Court must take all facts alleged in the complaint as true and construe them in the light most favorable to the non-moving party. *Northern States Power v. Franklin*, 122 N.W.2d 26, 30 (Minn. 1963). To survive a motion to dismiss under Rule 12.02(e), a complaint must set forth a legally sufficient claim for relief. *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997). It is immaterial whether or not the plaintiff can prove the facts alleged. *Martens v. Minnesota Min. & Mfg. Co.*, 616 N.W.2d 732, 739 (Minn. 2000). Where a complaint fails to state a claim upon which relief can be granted, dismissal with prejudice and on the merits is appropriate. *Id.* at 748.

A notice of contest must specify the grounds on which the contest will be made. Minn. Stat. § 209.021, subd. 1. A notice of contest must be valid under the statute pursuant to which it is filed, “stating facts upon which, if proved, relief could be granted.” *Greenly v. Independent School Dist. No. 316*, 395 N.W.2d 86, 90 (Minn. Ct. App. 1986)(contesting school board election pursuant to Minn. Stat. § 123.32);¹ *Christenson v. Allen*, 119 N.W.2d 35, 39 (Minn. 1963). A notice of election contest is sufficient if it states facts sufficient to apprise the contestee of the grounds of the contest so that he is given a fair opportunity to meet the asserted claims. *Id.* (citing *Christenson*, 119 N.W.2d at 39 (1963)). Thus, “[a] notice which charges irregularities in the election but fails to allege how these irregularities deprived the voters of a fair election does not constitute valid notice.” *Greenly*, 395 N.W.2d at 90 (citing *Hancock v. Lewis*, 122 N.W.2d 592, 595 (Minn. 1963));² *Christenson*, 119 N.W.2d at 39 (holding a “mere surmise that errors may have occurred in counting the ballots” speculative and insufficient to invoke jurisdiction of

¹ Section 123.32 was repealed by Laws 1987.

² The contestant in *Hancock* alleged certain irregularities occurred in the election, “depriving the qualified electors of Pine Island Village of a fair opportunity to vote at [a contest involving a special election to determine whether the village should issue bonds for the purpose of constructing a nursing home] and that said election should be held invalid and the results nullified.” *Hancock*, 122 N.W.2d at 593-94. The Minnesota Supreme Court affirmed the district court’s dismissal of the election contest on the grounds that the original notice of contest was invalid. *Id.*

the court).³ Dismissal of a notice of election contest is appropriate where the claims are “too general, uncertain, and indefinite.” *Soper v. Board of County Com'rs of Sibley County*, 48 N.W. 1112 (Minn. 1891).⁴

Contestants filed a Notice of Contest with the Ramsey County District Court Administrator on January 6, 2009, stating and alleging Coleman received the largest number of votes legally cast for the office of United States Senator from the State of Minnesota, entitling him to the Certificate of Election, on account of “irregularities, matters and things,” *Notice* ¶ 9(a); “numerous and material errors, mistakes and other irregularities in the counting, tallying, recording, adding, returning and canvassing of Ballots,” *id.* ¶ 9(b); “numerous and material errors, mistakes and other irregularities in the recanvass of Ballots,” *id.* ¶ 9(c); and “numerous and material errors, mistakes and other irregularities in the counting, tallying, recording and adding of Ballots,” *id.* ¶ 9(d). Specifically, Contestants assert that:

³ Contestant and contestee in *Christenson* were opposing candidates for the office of state senator from the 43rd legislative district. *Christenson*, 119 N.W.2d at 37. Following a declaration by the Ramsey County Canvassing Board that contestee was elected by a margin of 66 votes, contestant served and filed a verified notice of election contest stating in part that “[contestant] has reason to believe that possible errors could have occurred in counting of ballots in said election” and prayed the court to withhold an election certificate pending a recount of the ballots. *Id.* The Minnesota Supreme Court held such allegations alone would not entitle a contestant “as of right” to an inspection of the ballots. *Id.* at 39. The Court continued:

we are constrained to hold that a notice of contest designed to limit the contest to a recount of the votes cast, which fails to allege any irregularities either in the conduct of the election or the canvass of votes, or any violation of the election law, by a plain statement showing that the contestant is entitled to a decree changing the declared result of the election, is a nullity and insufficient to invoke the jurisdiction of the court. It is to be emphasized that we are not declaring what must be alleged but that what was alleged is insufficient.

Id. at 40-41.

Although subsequent statutory amendments to section 209.021 altered *Christenson*'s holding as to the jurisdictional requirements, *Holmen v. Miller*, 206 N.W.2d 916, 922 (Minn. 1973), Minnesota courts continued to be guided by its findings with respect to the sufficiency of notice. *Greenly*, 395 N.W.2d at 90, n. 1 (“[T]he *Christenson* opinion is still persuasive dicta in this case”).

⁴ The *Soper* court found the claim: “a large number of legal voters of said town desired and attempted to cast votes [...], but with the knowledge, consent, and connivance of the said judges of election, they were, by violence and threats, prevented from casting their votes” indefinite and uncertain. *Soper*, 48 N.W. at 1112. The Minnesota Supreme Court noted by way of dicta that a contestant may seek leave from the Court to make the claims more “definite and specific” when such claims are objectionable as being too indefinite or uncertain. *Id.* In such instances, the burden is on the contestant to apply for such leave. *Id.*

[W]rongfully and erroneously *excluded* from the vote totals certified by the Board were Ballots from absentee ballot envelopes which were initially rejected by local election officials and then were again improperly rejected by local election officials and/or representatives of [contestee] during the Recount. *Id.* ¶ 10

[A] material and significant number of absentee ballot envelopes ... were improperly rejected by local election officials and were not counted on Election day *or* during the Recount. *Id.* ¶ 11.

[E]rroneously and wrongfully included in the vote totals certified by the Board were a significant and material number of (a) Ballots which were counted twice during the Recount due to such Ballots being not marked as "DUPLICATES" and matched with its "Original" Ballot ... (b) Ballots which were not counted on election night but were "found" and counted during the Recount ... (c) [a]lleged Ballots which were *not* located or viewed during the Recount but which were "counted" during the Recount and included within Recount totals because they were deemed "missing" by the Board ... (d) Ballots from rejected absentee ballot envelopes which were *erroneously* opened and counted by the Minnesota Secretary of State's Office on Saturday, January 3, 2009 ... (e) Ballots from absentee ballot envelopes which were improperly and wrongfully accepted by local election officials on Election Day ... (f) Ballots which were challenged by representatives of [contestant] during the Recount, which challenges were erroneously and inconsistently rejected by the Board ...; and (g) Ballots which were challenged by representatives of [contestee], which challenges were erroneously and inconsistently upheld by the Board[.] *Id.* ¶ 12(a)-(g)(emphases in original).

Additionally, the Notice of Contest alleges that ballots were in such a condition that "the intent of the voter could not be ascertained," (*Notice* ¶ 13); ballots were counted in which "the voters did not comply with all of the requirements of the Minnesota Election Law," (*id.* ¶ 14); "unqualified and ineligible persons" voted in violation of election law, (*id.* ¶ 15); "[a] material number of persons voted more than once," (*id.* ¶ 16); ballots cast for Coleman were "erroneously rejected" and "erroneously *not* counted," (*id.* ¶ 17); election judges "failed to initial the backs of Ballots under their control," (*id.* ¶ 18); the Minnesota State Canvassing Board "failed to detect

and correct obvious errors," (*id.* ¶ 19); and local canvassing boards "failed to detect and correct obvious errors," (*id.* ¶ 20).

Given the expedited nature of this election contest and the pending trial, the Court is sensitive to Contestee's concern that the Notice of Contest be as specific as possible. The Court strives as its ultimate goal to conduct the proceedings in such a way that the public will have faith in our electoral process and confidence in our judicial system. The Court has thoroughly and carefully reviewed the Notice of Contest with these concerns in mind and finds Contestee has not met his burden of proof. The Notice of Contest is not based on speculation, *Christenson*, 119 N.W.2d at 39, nor are the claims contained therein "too general, uncertain and indefinite," *Soper*, 48 N.W. at 1112.

The Court finds the Notice of Contest sufficiently specifies the grounds on which the contest will be made pursuant to Minnesota Statute § 209.021, subd. 1, specifically referencing absentee ballots, missing ballots, and ballots that were counted twice. Viewing the Notice of Contest in light of relevant case law and construing the facts alleged in the light most favorable to Contestants, the non-moving party, *Northern States Power*, 122 N.W.2d at 30, the Court finds the Notice of Contest puts Contestee on notice of the grounds of the contest and affords him a fair opportunity to rebut the asserted claims. *See Greenly*, 395 N.W.2d at 90; *Christenson*, 119 N.W.2d at 39. Therefore, the Court finds the pleading sufficient to survive a motion to dismiss.⁵

III. Conclusion

For the aforementioned reasons, Contestee's motion to dismiss is denied.

⁵ Contestee also seeks to dismiss Contestants' claims for failure to state a claim upon which relief may be granted. Dismissal is appropriate where a notice of contest fails to state a justiciable claim. *Derus v. Higgins*, 555 N.W.2d 515 (Minn. 1996). In effect, this is a reiteration of Contestee's claims under his motion to dismiss for lack of jurisdiction, analyzed separately.