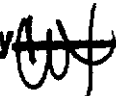


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STATE OF MINNESOTA
COUNTY OF RAMSEY

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 OPPOSITION TO CONTESTANTS'
MOTION FOR AN ORDER DECLARING
RECOUNT RULE 9 INVALID AS A MATTER OF LAW**

v.

Al Franken,

Contestee.

Citing no rule of procedure, Contestants ask this Court for an extraordinary order: to declare a recount rule invalid notwithstanding its endorsement by the State Attorney General, the Secretary of State's Office, the State Canvassing Board, and the parties; and to require that certain votes "be subtracted" from candidate totals based on a theory that is legally deficient and unsupported by proof. Contestants' Motion for an Order Declaring Recount Rule 9 Invalid as a Matter of Law at 11 ("Rule 9 Motion") sets forth demonstrably incorrect assumptions as though they were fact, and it proposes a remedy improper even on its own terms. Contestants' argument fails as a matter of law, logic, and equity. The motion should be denied.

FACTUAL BACKGROUND

In November 2008, two officials in the Secretary of State's Office drafted proposed Administrative Recount Procedures to prepare for the upcoming recount. Gelbmann/Jan.28/11.30. The proposed procedures created an administrative process for the

review and recount of validly cast votes, and they did so under one set of standards and with central oversight.

The Administrative Recount Procedures included a rule ("Rule 9") addressing the issue of original versus duplicate ballots. Rule 9 read:

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.

Ex. F-10.

Deputy Secretary of State James R. Gelbmann provided Contestants and Contestee with a draft of the proposed Administrative Recount Procedures, including Rule 9. He asked both campaigns for feedback and for suggested changes. Ex. F-12.

On November 18, 2008, the State Canvassing Board held a meeting, which representatives for both candidates attended. When the Board opened the floor for comments regarding the proposed Administrative Recount Procedures, Contestants' representative suggested no changes to the proposed Administrative Recount Procedures. *Id.*

Both parties agreed that Rule 9 should be adopted. In a letter to the State Canvassing Board, Coleman attorney Tony Trimble so conceded. Ex. F-1995. Both parties, as well as the Attorney General's Office, were of the view that original ballots best showed voter intent. Gelbmann/Jan.28/1:45 (approx.); Poser/Feb.23/2:30; Ex. F-17.

The Secretary of State's Office had some concerns about Rule 9 prior to its clarification on the first day of the recount. Gelbmann/Jan.29/11:00 (approx.). The Secretary of State's Office nevertheless understood that there would be risks inherent in relying either on originals or on duplicates. Gelbmann/Jan.28/1:45 (approx.).

On November 19, 2008, the first day of the recount, Director of Elections Gary Poser provided election officials with additional guidance as to the question of original and duplicate ballots. He explained, "if there is an apparent significant discrepancy in the numbers [of duplicate ballots versus original ballots], the candidates' representatives should attempt to agree on whether to sort the original or duplicate ballots. . . . If the two candidates can not agree, the Deputy Recount Official shall sort and count the original ballots." Ex. F-21; *see also* Exs. F-27; F-28; F-30. In response to a request that the candidates "[c]all or e-mail if you have concerns" about Mr. Poser's additional guidance, counsel for Contestants stated: "This is perfectly clear. Thank you." Ex. F-24.

Rule 9 as clarified on November 19 was the rule followed during the recount. *See* Gelbmann/Jan.29/11:15-11:30; Poser/Feb.23/1:30; *see also* F-47 (applying Rule 9 in Brooklyn Park). On the first day and successive days of the recount, the Coleman campaign demanded that Rule 9 be applied. *See* Exs. F-21, F-25, F-40. In some precincts, reliance on the originals rather than the duplicates resulted in a net gain of votes for Coleman. *See, e.g.,* Boyle/Feb.11/3:10 (discussing Lakeville Precinct 6). In other precincts, reliance on the originals rather than the duplicates resulted in a net gain of votes for Franken. *See, e.g.,* Boyle/Feb.11/3:10 (discussing Lakeville Precinct 10).

The Secretary of State's Office concluded that Rule 9, as clarified, was the rule that best addressed the issues that arise from duplicate and original ballots. Gelbmann/Jan.29/11:28. The Secretary of State's Office further concluded that the parties would not later dispute the treatment of original versus duplicate ballots, given that each party had helped to formulate Rule 9 and had agreed on the process. Gelbmann/Jan.29/11:24.

Yet, once the recount was complete, and the effect of Rule 9 on the candidates' totals became clear, Contestants did dispute the rule. They objected to Rule 9 after the entire recount

has been completed in reliance on the agreement, after Contestants demanded strict compliance with the agreement during the recount, and after the State Canvassing Board completed its review of virtually all challenged ballots. *See Poser/Feb.23/2:30-3:30*. Contestants went so far as to petition the Minnesota Supreme Court. *See Coleman v. Minnesota State Canvassing Bd.*, 759 N.W.2d 44 (Minn. 2008). Though the Court withheld judgment as to Contestants' double-counting claims, it recognized the legality of Rule 9 in its refusal to forbid application of the rule or otherwise to grant Contestants relief. *Id.*

DISCUSSION

1. Contestants' Request for the Declaration Regarding Rule 9 Must Be Denied.

Contestants ask this Court to declare "Rule 9 as applied during the recount in [certain precincts] to be invalid as a matter of law." Rule 9 Motion 13. Yet as the governing law makes clear, Rule 9 is perfectly legal; it was correct for officials to apply it; it is entitled to deference; and Contestants are barred from challenging it now.

a. Controlling Case Law Requires that the Court Reject Contestants' Request.

The Minnesota Supreme Court has already heard and rejected Contestants' claim as to the validity of Rule 9. As a result, Contestants' requested relief is barred both by principles of res judicata and controlling case law. When Contestants alleged double counting in December 2008, they did so by raising precisely the same arguments they do now. *See Coleman v. Minnesota State Canvassing Board*, No. A08-2206, Petition for an Order To Show Cause Pursuant to Minn. Stat. § 204B.44 at 10-12 (Dec. 19, 2008), available at http://moritzlaw.osu.edu/electionlaw/litigation/documents/Petition_A08-220644_.pdf (addressing Rule 9); *see also id.* at 8-10 (addressing Minn. Stat. § 206.86, subd. 5 and Minn. R. 8230.3850), 15 (arguing that "Non-Matching Original Ballots" were not "votes validly cast"); *id.* (declaring the Rule 9 agreement irrelevant and unenforceable); *Coleman v. Minnesota State*

Canvassing Board, No. A08-2206, Reply Memorandum in Support of Petition at 6-7, 8-10 (Dec. 22, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/Coleman-Canvass-Reply-12-22-08.pdf>. Yet the Supreme Court both declined to declare Rule 9 invalid as a matter of law and refused to halt or undo its application. *Coleman*, 759 N.W.2d at 46. To the contrary, it held that "[t]here can be no dispute that unmatched original damaged ballots are valid ballots and the votes marked on those ballots should be counted in the election" and that, in light of the arguments properly before it, "the decision of the State Canvassing Board to reject challenges to unmatched original damaged ballots counted in the recount was not in error." *Id.* The Court did decline to resolve a distinct, factual issue: "whether counting the votes on the unmatched original damaged ballots in the recount will result in double-counting because those votes have already been counted based on an unmarked duplicate ballot." *Id.* Such a claim, the Court held, was "better suited to an evidentiary hearing and fact-finding." *Id.* The Court nevertheless was able to resolve purely legal arguments, and it did so by rejecting Contestants' claims. As a result, the Supreme Court's decision precludes this Court from declaring Rule 9 invalid as a matter of law.

b. Rule 9 Is Fully in Accord with Minnesota Law.

Even if the Supreme Court had not so ruled, Contestants' argument must fail because it depends on a misconstruction of the applicable Minnesota Statutes.

Minn. Stat. § 204C.35, subd. 3 provides:

A recount conducted as provided in this section is limited in scope to the determination of the number of votes validly cast for the office to be recounted. Only the ballots cast in the election and the summary statements certified by the election judges may be considered in the recount process.

Thus, in a recount, it is necessary to determine the number of votes "validly cast" based only on the summary statements and "the ballots cast in the election."

As the relevant statutes make clear, a ballot is "cast" at the time the voter completes and relinquishes control over the ballot. *See, e.g.*, Minn. Stat. § 204C.20 ("If two or more ballots are found folded together like a single ballot, the election judges shall lay them aside until all the ballots in the box have been counted. If it is evident from the number of ballots to be counted that the ballots folded together were cast by one voter . . .") (emphasis added); *see also* American Heritage Dictionary, cast, 5. ("To deposit or indicate (a ballot or vote)"). Which cast ballots are "valid" is primarily defined by Minn. Stat. § 204C.22, subd. 1. It provides that a ballot is valid if the voter's intent is determinable. Minn. Stat. § 204C.22, subd. 1. Further, Minnesota law requires that election officials determine the "voter's intent" "only from the face of the ballot." Minn. Stat. § 204C.22, Subd. 2. Thus, a vote "validly cast" is an original ballot completed by an eligible voter from which the voter's intent may be determined.

In contrast, duplicates are not "ballots cast" pursuant to Minnesota law. The duplicate ballot is filled out by an election official who subsequently places the original ballot in an "originals" envelope while the duplicate ballot is "placed with the other valid ballots to be tabulated." Minn. Rule, part 8230.3850, subp. E. The use of "tabulated" instead of "cast" is significant. *Compare* Minn. Rule, part 8235.0200 ("The scope of an automatic or administrative recount is limited to the recount of the ballots cast and the declaration of the person nominated or elected"), *with* Minn. Rule, part 8230.3850, subp. E (duplicate ballot "must be placed with the other valid ballots to be tabulated"). Under well-established rules of statutory interpretation, "[t]he use of different words within related statutes generally implies that different meanings were intended." *State Farm v. Liberty Mut. Ins. Co.*, 678 N.W.2d 719, 725 (Minn. Ct. App. 2004) (quoting *United States v. Bean*, 537 U.S. 71 (2002)). Here, the difference is clear: The original ballot is the one that has been "cast"; the duplicate ballot has never been "cast" but is

merely "tabulated" in lieu of the original cast ballot that cannot be fed through an automatic tabulating machine.

Contestants' reliance on out-of-state authority does nothing to change this result, just as it did nothing when Contestants raised these cases before the Minnesota Supreme Court.

Contestants rely on *Wright v. Gettinger*, 428 N.E.2d 1212 (Ind. 1981), in which election officials failed to place a serial number on the ballots as required by a procedural statute. In that case, the Indiana Supreme Court threw out both original ballots *and* their duplicates. *Id.* at 1223. An analogous fact pattern existed in *Larson v. Board of Education*, 118 Ill.App.3d 1015 (Oct. 24, 1983), and the Illinois court reached the same result. Not only is such a remedy directly contrary to that which Contestants seek here, but to willfully disenfranchise voters because of election official failure to comply with procedural statutes would be anathema to Minnesota law (particularly, as addressed in more detail below, where Contestants have presented no concrete evidence of double counting). *See Application of Andersen*, 119 N.W.2d 1, 8 (Minn. 1962) (holding that election laws must be interpreted in favor of enfranchisement). Notably, neither *Wright* nor *Larson* has ever been cited by a court for the proposition for which petitioner cites them, and the statute which led to the perverse result in *Wright* has since been repealed. *See* Ind. Pub. Law 5-1986, § 61 (repealing Ind. § Code 3-2-4-5(c)).

Thus, Minnesota law makes clear that whether a damaged ballot was counted by a vote counting machine, it is the original ballot, and not the duplicate, that determines whether a vote was validly cast. Indeed, the determination of the voter's intent under the applicable law cannot be made by examination of a duplicate ballot because the voter did not fill out the duplicate ballot. To hold otherwise, would nullify the exercise of determining voter intent and the existence of distinguishing marks. Thus, Rule 9 was properly based on the applicable law.

c. Minn. Stat. § 206.86 Is Inapplicable to Manual Recounts.

Contestants' assertion that Minn. Stat. § 206.86 defines which votes were "validly cast" in an election contradicts Supreme Court precedent, distorts the statute's language, and creates inconsistency among the governing statutes. As the Minnesota Supreme Court held in December, "[t]here can be no dispute that unmatched original damaged ballots are valid ballots and the votes marked on those ballots should be counted in the election." *Coleman*, 759 N.W.2d at 46. This ruling is controlling, and it is correct. In construing statutes, courts "interpret the statute's text according to its plain language." *McIntosh v. McIntosh*, 740 N.W.2d 1, 9 - 10 (Minn. App. 2007). "A statute should be interpreted, whenever possible, to give effect to all of its provisions; no word, phrase, or sentence should be deemed superfluous, void, or insignificant." *Id.* (internal quotations omitted). Furthermore, statutes must be construed to avoid a strained construction or absurd result. *See Fettes v. Mayo Foundation for Medical Educ. and Research*, 547 N.W.2d 423, 425 (Minn. App. 1996). *State v. Campbell*, 756 N.W.2d 263, 274 (Minn. App. 2008) (courts reject statutory readings that would create an absurd result). Here, application of Minn. Stat. § 206.86, subd. 5, to the recount process would be inconsistent with its plain language and would lead to an absurd result in that it would directly contradict Minn. Stat. § 204C.22, which expressly requires that voter intent be determined from the face of the ballot.

Minn. Stat. § 206.86, subd. 5, applies only to the machine count of ballots and not to a manual recount carried out pursuant to Minn. Stat. § 204C.35. By its own terms, it applies only "[i]n precincts where an electronic voting system is used." *Id.* § 206.86, subd. 1. Nowhere does Section 206.86 prescribe or define which ballots are "validly cast." Rather, Section 206.86, which is titled "Counting Electronic Voting System Results," lays out the process of initial tabulation of electronic ballots cast on Election Night. *See Essling v. Markman*, 335 N.W.2d 237, 240 n. 2

(Minn. 1983) (title of statute may be considered as indicator of legislative intent). Thus, Minn. Stat. § 206.86, subd. 1-3, first sets forth the process by which ballot cards cast at a precinct using an electronic voting system must be gathered and transported to the Election Night counting center. It then lays out the procedure for conducting the preliminary tabulation of ballot cards on automatic tabulating equipment. *Id.*, subd. 4. Then, it addresses processing ballots that are so damaged or defective that they cannot be “counted properly by the automatic tabulating equipment.” In that case, the election judges prepare a duplicate copy of those ballots. Minn. Stat. § 206.86, Subd. 5. Quite logically, as the entire problem is that the damaged or defective ballot cannot be run through the automatic tabulating machine in the first instance, subdivision 6 provides that the duplicate should be “counted in lieu of the damaged or defective ballot card.”

The folly of Contestants’ position is that where a recount is being conducted manually, not by machine, there is absolutely no statutory or principled reason whatsoever to follow the procedure created to ensure that the machine can count the available ballots. In a recount, the determination of voter intent is paramount. Voter intent cannot be determined from the “duplicate” ballot prepared by election officials; it can only be determined from inspecting the “original” ballot prepared by the voter.

Thus, a plain and natural reading of § 206.86, Subd. 5, reveals that it is solely concerned with the original Election Night tabulation of ballot cards that ensures that a lawfully cast ballot rejected by an automatic tabulation machine may nonetheless be counted. The subsection simply has no bearing whatsoever on whether an original or duplicate ballot should be counted during a mandatory, manual recount.

Worse still, interpreting § 206.86, Subd. 5 to require election officials to consider and count a ballot filled out by election judges, despite the fact that state and county election officials preserved the original ballot actually filled out by a voter, would directly conflict with Minn.

Stat. § 204C.22. When interpreting statutes, courts “seek to harmonize potentially conflicting provisions and give effect to all provisions.” *In re Estate of O’Neil*, No. A06-1224, 2007 WL 1191781, *4 (Minn. Ct. App. Apr. 24, 2007) (citing Minn. Stat. §§ 645.16, 645.17(2) (2006)). Here, Contestants’ preferred interpretation renders § 204C.22, which requires giving effect to a voter’s expressed intent as ascertained “only from the face of the ballot,” impossible to apply. The same is true of the existence of distinguishing marks; determining whether “the voter intended to identify the ballot” under Minn. Stat. § 204C.22, subd. 13, is only possible by viewing the voter’s original ballot and not the duplicate prepared by the election officials. Construing Minn. Stat. § 206.86, Subd. 5 to require elections officials to use a duplicate ballot, rather than an original, in determining a voter’s intent is directly contrary to this provision, and it confirms that Contestants’ construction of the statute is in error.

d. The Secretary of State’s Interpretation of the Law Is Entitled to Deference.

To the extent that any ambiguity is claimed to exist with respect to the applicable law, the Secretary of State’s interpretation, as ratified by the State Canvassing Board—that original ballots should be counted—is subject to deference. Pursuant to Minn. Stat. § 204C.361, the Secretary of State is given explicit rule-making authority to promulgate rules to establish a uniform recount procedure. *Accord* Minn. Stat. § 204B.27, Subd. 2 (“The secretary of state may prepare and transmit to the county auditors and municipal clerks detailed written instructions for complying with election laws relating to the conduct of elections, conduct of voter registration and voting procedures.”). Here, the Secretary of State exercised this authority, with the endorsement of the State Canvassing Board, by promulgating rules governing all recounts, and accordingly, this election for United States Senator must be conducted in accordance with those rules. *See id.*; Minn. R. part 8235 *et. seq.*

Because the Secretary of State is authorized to and has promulgated rules designed to carry out the legislature's intent, to the extent that governing statutes or regulations are ambiguous, the Secretary of State's interpretation of them must be accorded deference. *George A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988) (“[A]n agency’s interpretation of the statutes it administers is entitled to deference and should be upheld, absent a finding that it is in conflict with the express purpose of the Act and the intention of the legislature.”); *Risdall v. Brown-Wilbert, Inc.*, 753 N.W.2d 723, 733 (Minn. 2008) (“When an agency’s regulation is ambiguous, [the court] give[s] deference to the agency’s interpretation and will generally uphold that interpretation if it is reasonable.”) (internal quotations omitted).

The Secretary of State and the State Canvassing Board, with advice from the Attorney General, interpreted the applicable statutes and regulations to require that original ballots should be counted when available, as manifested in Rule 9 and his published guidance to county election officials. Their decision was properly supported by Minn. Stat. § 204C.22, which requires that a voter’s expressed intent be given effect, and Minn. Stat. § 204C.22, Subd. 3, which requires that the voter’s intent be ascertained “only from the face of the ballot.” Accordingly, the Secretary of State’s determination that the original ballot should be counted, notwithstanding any numerical discrepancies, is entitled to deference, and never more so than here, where all parties to the recount explicitly and emphatically endorsed that interpretation.

e. Contestants Are Estopped from Challenging Rule 9.

As an additional, independent ground for rejecting Contestants' claim, they are estopped from raising it. Where, as here, the parties agreed that the original ballots would be counted, well-settled principles of Minnesotan common law prohibit Contestants from challenging the very process to which they agreed.

Under well-established principles of estoppel, “a party that has taken one position in litigating a particular set of facts [is precluded] from later reversing its position when it is to its advantage to do so.” *Bauer v. Blackduck Ambulance Ass’n, Inc.*, 614 N.W.2d 747, 749-50 (Minn. Ct. App. 2000); *see also Ferraro v. Camarlinghi*, 75 Cal. Rptr. 3d 19, 59 (Cal. Ct. App. 2008) (noting applicability of judicial estoppel doctrine to “quasi-judicial administrative proceedings”). Courts uniformly condemn attempted manipulation “by chameleonic litigants who seek to prevail, twice, on opposite theories.” *Levinson v. United States*, 969 F.2d 260, 264 (7th Cir. 1992); *see also Minnesota Vikings Football Club, Inc. v. Metro. Council*, 289 N.W.2d 426, 430-31 (Minn. 1979).

In *Minnesota Vikings*, where a party attempted to avoid its agreement that any appeal would be brought within three days or not at all, this Court observed that the agreement was binding:

[A]n oral representation to the court made by an attorney in the course of litigation is a solemn obligation which must be fulfilled . . . [as it would] be impossible for a court system to function if the representations of attorneys, particularly in the presence of and with the acquiescence of their clients, could not be relied upon. This is particularly true in the present case where major . . . decisions involving a significant number of persons and substantial sums of money were held in suspense by the pendency of legal proceedings awaiting final resolution.

289 N.W.2d at 430-31.

Similarly here, Contestants must be held to their agreement. It is undisputed that at the beginning of the recount process, the Secretary of State, the State Canvassing Board, Contestee and Contestants agreed that only original ballots should be counted. As a result of the parties’ agreement, the Secretary of State’s Office directed local election officials to tabulate original ballots rather than duplicates. The entire recount and canvass by both local election officials and the State Canvassing Board have proceeded on the basis of that agreement, which up until after the recount Contestants insisted should be subject to strict compliance.

Although Contestants claim that they agreed only to count originals based on the assumption that matching duplicates existed, the evidence does not support this assertion. As election officials have confirmed, Contestants were well aware that original ballots were being counted despite the absence of a matching duplicate, and in fact *insisted* on this procedure. *See, e.g., Poser/Feb.23/3:00-4:00; Ex. C-1612 (Wright County recount incident log).* Moreover, even if Contestants' incredible claim that this was in fact their assumption is true, it is irrelevant: Contestants are not claiming there was a mutual mistake, and Contestants are making no claim that they were defrauded into entering the agreement; a unilateral mistake which is not induced by fraud does not permit rescission of an agreement. *A.A. Metcalf Moving & Storage Co., Inc. v. North St. Paul*, 587 N.W.2d 311, 318 (Minn. Ct. App. 1998).

Finally, because Contestants allowed the entire recount process to go forward before they raised this issue with the State Canvassing Board, their claim is barred by laches. Laches is an equitable doctrine applied to “prevent one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the delay.” *Winters v. Kiffmeyer*, 650 N.W.2d 167, 169 (Minn. 2002). This Court has repeatedly applied the doctrine in election cases, because prejudice to the opposing party resulting from delay in such cases is particularly great. *See, e.g., Clark v. Pawlenty*, 755 N.W.2d 293, 303 (Minn. 2008) (“Given petitioners’ unreasonable delay in asserting the interpretations of the constitution and election statutes that they espouse here, and balanced against the significant potential prejudice to respondents, to other election officials, to Justice Gildea and potentially to other candidates, and to the electorate, we conclude that it would be inequitable to grant the relief sought by petitioners with respect to the primary ballot even if we were to conclude that their arguments had merit.”); *Marsh v. Holm*, 55 N.W.2d 302, 304 (Minn. 1952) (declining to consider the merits of a ballot challenge because “the petitioner ha[d] not proceeded with diligence and expedition in asserting

his claim”). Here, there can be no doubt that Contestants unreasonably delayed in raising their claim—not only did they wait until after the entire recount process, but they waited until numerous weeks after they entered into an agreement contrary to their current position.

In summary, Contestants' request for the Rule 9 declaration must be rejected on multiple, independent grounds.

2. This Court Should Deny Contestants' Request for an Order Directing that Certain Original Ballots Be Subtracted from the Vote Totals.

Contestants seek more than a declaration that Rule 9 is invalid. They also ask this Court to take the extraordinary step of ordering the "subtract[ion]" of votes associated with "ballots in those precincts which were challenged for the lack of a corresponding duplicate." Rule 9 Motion 13. Contestants' argument in support rests on faulty assertions and is unsubstantiated by proof. They have not proven that there were more votes than voters or that double counting occurred; and they have failed to address evidence that the counting of originals has properly enfranchised voters.

a. The Methodology Underlying Contestants' Claims Is Fundamentally Flawed.

Contestants' claim for relief requires that this Court accept the accuracy of certain figures and classes of ballots set forth in their briefing. Yet Contestants' methodology for making these determinations is fundamentally flawed.

Contestants apparently attempt to rely upon precinct rosters to determine the number of "voters present" in the precinct on Election Day. Rule 9 Motion 6. As unrefuted evidence on the record makes clear, however, precinct rosters cannot be relied upon in this manner. In Minneapolis 12-8, for example, more than a dozen individuals properly voted by absentee ballot but were not listed on the Election Day roster. *See* Howell/Mar. 2/12:06; *see also* F-2054. It is common, moreover, for voters to fail to sign in but still to vote, and as a result the rosters are

often underinclusive. Mansky/Jan.29/4:10, Feb.2/2:25; Gelbmann/Jan.29/11:20 (approx.); Reichert/Feb.26/10:45, 2:50; Smith/Feb.5/2:20; *see also* Arnold/Feb.20/11:30(approx) (discussing absentee ballot in Sherburne County that was not recorded in roster); Ex. F-1962 (incident report documenting failure to record ballot in roster).

Despite this unrefuted testimony, it appears Contestants have consulted nothing besides rosters to determine the number of "voters present" with respect to the ten precincts they feature in the Motion. Rule 9 Motion 6. The precise methodology is not clear, of course, because the sole explanation Contestants provide for the figures is a citation to dozens of exhibits and the bare statement that a "comparison of the exhibits demonstrates, in 10 Minneapolis precincts, [that] the number of votes counted during the recount exceeded the number of persons actually casting ballots at those precincts on election night." *Id.*

A comparison of the exhibits does not bear this assertion out. It is not at all apparent how Contestants arrived at their figures. To the contrary, the analytical work necessary to extrapolate a single figure for "voters present" in each precinct is extensive, difficult, and in some cases impossible, and Contestants have provide no means by which to understand their figures. It is not clear, for example, whether, when, and how Contestants determined which of the voters listed in each list should count in their "voters present" tallies. In addition, Contestants nowhere address differences between precincts in how to mark rosters, particularly with respect to more unusual forms of ballots (as presidential-only ballots or ballots designed for use in one precinct but erroneously received by another precinct). They do not explain how they handled the very real possibility that some voters failed to sign in on the relevant roster; that some election judges failed to mark the rosters with respect to each received ballot; and that some officials failed to secure, maintain, and then provide to Contestants all the materials that might be necessary to calculate the figures in question. *See* Howell/Mar. 2/12:06; Mansky/Jan.29/4:10;

Gelbmann/Jan.29/11:20 (approx.); Reichert/Feb.26/10:45; Smith/Feb.5/2:20. Indeed, Contestants did not even so much as enter into evidence the voter-registration applications received by each of the ten precincts for the November 4, 2008 election, even though this information was made available to the parties, and it often serves as a more reliable indication of the number of voters registering on Election Day than do the rosters cited by Contestants. Contestants similarly do not indicate whether they cross-checked their figures with absentee ballot envelopes or other available materials. All these materials, at a minimum, must be considered as part of a proper record for determining the number of voters in a precinct. Perhaps most problematically, Contestants do not provide a description of their work for the Court's own review and check, and they have not allowed Contestee any opportunity for cross examination. Contestants' voter figures, in short, prove nothing.

Contestants similarly err in their offhand definition of the so-called "non-matching original ballots." Rule 9 Motion 11. In Eagan P-3, for example, officials found an envelope after Election Day that contained seven original ballots and seven corresponding duplicates. While the seven original ballots are included in Contestants' category of "challenged original ballots," there is no plausible claim that any of the votes were counted on Election Night. *See* Boyle/Feb. 11/10:00-11:00; Poser/Feb. 23/3:50. As a result, were this Court to apply Contestants' slapdash analysis and proposed remedy to Eagan P-3, it unquestionably would result in the improper disenfranchisement of dozens of voters.

As a final point, when Contestants' failures of analysis and proof are considered together, even more problems arise. For example, the various figures Contestants provide with respect to certain precincts purport to show a difference in the number of voters present and the number of recount ballots. Contestants also cite a series of exhibits representing the number of challenged original ballots. Under Contestants' theory, these figures should be the same. However, they are

often not. Sometimes the apparent difference between the "voters present" and the "recount ballots" is less than the number of challenged originals. By Contestants' own accounting, "subtracting" all the originals ballots in that circumstance would be improper, given that there is no corresponding difference in the figures. Yet this is precisely the relief Contestants seek.

In short, Contestants' Rule 9 claim—that certain figures demonstrate double counting, so that a wide swath of votes should be uncounted—constitutes an analytical house of cards built atop flawed calculations and assumptions. Put simply, Contestants have failed to make their case. With respect to certain precincts, evidence undisputed on the record actually *proves* that Contestants' theory of the facts is incorrect. In others, the evidence is at best incomplete and ambiguous, and the figures unsupported and unreliable. Such a presentation is far from sufficient for the extraordinary remedy Contestants seek.

b. With Respect to Individual Precincts, Contestants Have Not Proven There Were More Votes than Voters or that Double Counting Occurred.

Contestants' claim for relief relies on the assumption that double counting occurred and that more voters existed than voters. Yet Contestants have proven none of these facts.

Contestants' entire case for double counting, as acknowledged both in their Rule 9 Motion and as shown during the trial, consists of a handful of rosters and challenged ballots they have admitted into evidence with respect to ten Minneapolis precincts, as well as the sporadic testimony of several election officials. At the outset, therefore, any double counting claim beyond those related to the ten Minneapolis precincts necessarily fails for lack of proof. Contestants have failed to provide the most rudimentary evidence (that is, rosters and challenged ballots) that would be necessary for their claim even to be analyzed by the Court.

As to the 10 precincts for which Contestants submitted some sort of evidence, that evidence does not even approach what would be necessary to make the case. As discussed

above, the ballots and the rosters do not prove what Contestants claim they do. Contestants further allude, without specific reference, to the testimony of Jim Gelbmann, Gary Poser, Joseph Mansky, Cynthia Reichert and Rachel Smith. However, nothing offered by any of these witnesses solves the claims' central deficiency: that is, the lack of a basis for concluding that some alleged discrepancy between certain totals was due to double counting rather than any number of other explanations for alleged discrepancies. *See* Mansky/Jan.30/11:51, Feb.2/10.40 (approx.) (acknowledging alternate explanations); *accord* Reichert/Feb.26/10:24, 2:50; Gelbmann/Jan.29/11:20, Jan.29/2:40 (approx.); Corbid/Feb.4/3:50, Feb.5/11:05; Boyle/Feb.11/10:50; Smith/Feb.5/4:00.

For nine of the precincts, the only evidence in the record specifically addressing each precinct is the rosters and ballots, without more. For a single precinct—Minneapolis 12-8—Contestants have also provided the testimony of Pam Howell. Yet Ms. Howell's testimony likewise fails to remedy the problem. Conjecture by a single election official normally cannot provide adequate proof of double counting, and it certainly cannot when the testimony in question is indefinite hearsay from a witness whose credibility has been called into question. Howell/Feb. 25/1:45 (basing conclusions regarding double counting on statements made by another party out of court); Mar. 2/11:25-12:15 (acknowledging exclusive substantive communications made with Contestants' attorneys, who were both hoping to avoid both the need to disclose those communications to Contestee's attorneys and "tying [the witness] down" to any particular testimony).

Perhaps because Contestants recognize they have failed to make their case, they suggest the Court should adopt a "presumption" that a duplicate ballot was made with respect to each original ballot and each duplicate was counted on election night. Rule 9 Motion 4. Such a presumption finds no support in Minnesota's election laws, and one would not be appropriate.

Indeed, Contestants' own theory for why the presumption should exist (that is, that the Court should assume that election officials followed the law by creating a duplicate and then running it through the machine on Election Day) applies equally with respect to a directly competing presumption (that is, that the Court should assume that election officials followed the law by creating a duplicate and *marking it* and then running it through the machine on Election Day). Contestants also cite *Johnson v. Trnka*, 154 N.W.2d 185 (Minn. 1967), but the case is inapposite: *Johnson* addresses a repealed statute, Minn. Stat. § 204.20, that was limited to actions to be taken on Election Day. In short, Contestants have failed to meet their burden; they have provided no ground upon which this Court could conclude that the alleged double counting actually occurred.

c. Contestants Have Failed To Address the Fact that, in Many Cases, the Counting of Originals Properly Enfranchised Voters.

Contestants seek to have all challenge originals uncounted. Yet, as the record makes clear, the counting of original ballots often results in the proper enfranchisement of voters, and to refuse to count those originals would improperly negate those votes.

In Minneapolis Precinct 8-7, for example, the ballots "challenged for the lack of a corresponding duplicate" include a number of ballots that were in fact original ballots for which duplicates were made but never counted. *See Reichert/Feb. 26/10:00-11:00* (describing and confirming that the duplicates had gone missing but then were found; that the duplicates were never counted, either on Election Day or after; and that had the duplicates never been found there would be no way of knowing for sure whether the duplicates had been made or counted); F-85 (e-mail from Sara Graffunder to Cindy Reichert, Nov. 9 2008).

3. Contestants' Motion Is Procedurally Deficient.

Finally, Contestants' motion is procedurally adrift. It is impossible to discern what rule Contestants purport to invoke in moving for their proposed relief. Given that Contestants rely

heavily upon disputed factual assertions in seeking relief, resolution of the Motion requires application of the high standards of proof applicable in the summary judgment context. Yet even under a far more relaxed standard, such as that applicable to a Minn. R. Civ. P. 41.02(b) motion, Contestants' claim fails. It should be denied on the merits as well as on procedural grounds.

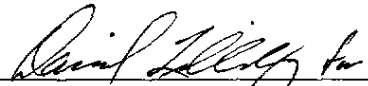
CONCLUSION

For the foregoing reasons, Contestee Al Franken respectfully requests that this Court deny Contestants' Motion for an Order Declaring Recount Rule 9 Invalid as a Matter of Law.

Dated: March 5, 2009.

PERKINS COIE LLP

By:

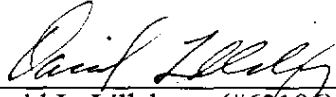


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