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5) STATE OF MINNESOTA  
COUNTY OF RAMSEY

DISTRICT COURT  
SECOND JUDICIAL DISTRICT  
Case Type: CIVIL OTHER

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.

**CONTESTANTS'  
MEMORANDUM OF LAW IN  
OPPOSITION TO MOTION TO  
DISMISS**

**INTRODUCTION**

Mr. Franken would have this Court's duty limited to mere "mathematical matter[s]," essentially re-counting what the canvassing board has already recounted. He is dead wrong: the Court's duty is not so constrained; nor is its power so restrained. Minnesota's election statutes dictate a much different picture—the canvassing board recounted what was counted on election night, and this Court adjudicates whether all legally cast ballots were counted and whether any votes were counted twice.

Contestants filed a Notice of Contest that directly and specifically challenges whether the recount properly included and tallied legally cast ballots with respect to rejected absentee ballots, apparent double-counting of duplicate and original ballots and instances of missing ballots, as well as other matters. Those claims are stated with

sufficient specificity to put Franken on notice (there are no surprises at this point in the process) and they fall squarely within Minn. Stat. § 209.12 and thus within this Court's jurisdiction, as the Supreme Court, the canvassing board and even Franken himself have all previously recognized. Nothing in the U.S. Constitution precludes this Court from exercising its jurisdiction under the statute.

The Court should deny Franken's motion to dismiss and allow the parties to get on with the critical job of trying these claims and enabling Minnesota's second Senator to be seated promptly.

### ARGUMENT

#### **I. THIS COURT HAS JURISDICTION TO RESOLVE ALL ISSUES NECESSARY TO DETERMINE THE HIGHEST NUMBER OF VOTES LEGALLY CAST IN THE ELECTION FOR U.S. SENATOR**

Notwithstanding Franken's recent about-face on the issue, there can be no doubt this Court has jurisdiction to determine not only tabulation issues but also "incident-based" issues related to the legality of votes. Under Minnesota's two-tier statutory process, the canvassing board has limited, administrative authority to tabulate votes counted on election day and the contest court is empowered to determine whether votes are legally cast, that is, whether every valid vote has been counted and whether any vote has been counted more than once. The narrow interpretation Franken now advocates—that the Court is limited to a pure mathematical function and cannot make any judicial decisions—would deprive the eligible voter, including a candidate, of any meaningful right to contest an election.

That, of course, is not the law. As set forth below, Minnesota's statutes, its historical case law, the pronouncements of the Supreme Court in the context of this election, and sheer fairness dictate this Court's broad jurisdiction.

**A. By Statute, The Court Has Jurisdiction To Review Whether Ballots Were Properly Excluded, Included, Or Counted.**

The jurisdiction of this Court is defined by Minn. Stat. Ch. 209, which provides the second step of review after the canvassing board has completed its duties. *Coleman v. Ritchie*, -- N.W.2d --, 2009 WL 20954, at \*2 (Minn. Jan. 5, 2009) (attached as Ex. A to the Affidavit of James K. Langdon ("Langdon Aff.")). While the canvassing board's jurisdiction is limited to ministerial duties associated with counting and certifying the results of the election, *O'Ferrall v. Colby*, 2 Minn. 180, 1858 WL 2544, at \*5 (Minn. 1858) (Langdon Aff., Ex. G), a contest court is not so limited. *See Hancock v. Lewis*, 122 N.W.2d 592, 594 (Minn. 1963). A canvassing board's powers are "purely ministerial," and have not extended to the question "whether any returns . . . from established precincts contained illegal votes." *Id.* at \*3; accord Minn. Stat. § 204.31, subd. 3. Indeed, the Legislature established the contest court as the exclusive venue to resolve any issues necessary to determine the "highest number of votes legally cast" in an election to the United States Senate. Minn. Stat. § 209.12; *see also* Minn. Stat. § 209.02, subd. 1.

In a recount, the canvassing board is confined to considering "[o]nly the ballots cast in the election" and the summary statements certified by the election judges. Minn. Stat. § 204C.35, subd. 3; *see also* Minn. R. 8235.002. The Secretary of State's own Recount Guide confirms the limited meaning of "ballots cast":

This is an administrative recount held pursuant to M.S. 204C.35 and M.R. 8235. It is not to determine who was eligible to vote. It is not to determine if campaign laws were violated. It is not to determine if absentee ballots were properly accepted. It is not—except for recounting the ballots—to determine if judges did things right. It is simply to physically recount the ballots for this race!

*See* Langdon Aff. Ex. B (2008 Recount Guide) at 6. In a contested election for U.S. Senator, however, this Court is empowered to determine the “highest number of votes legally cast” in an election.

To determine whether a vote was “legally cast,” the Court may have to review the decision by local election officials to exclude or include that ballot in certified totals. *See Johnson v. Tanka*, 154 N.W.2d 185, 187-88 (Minn. 1967) (reviewing election judges’ decisions on how to count ballots); *In re Contest of Election of Vetsch*, 71 N.W.2d 652 (Minn. 1955) (reviewing whether to include votes from precinct where major irregularities occurred); *O’Ferrall*, 1858 WL 2544, at \*3 (reviewing clerk’s decision to exclude votes from one precinct). This is precisely what this Court is being asked to do in connection with rejected absentee and mail ballots, on the one hand, and the double-counting of original and duplicate ballots, on the other hand.<sup>1</sup> Were it otherwise, were

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<sup>1</sup> Another component of the “legally cast” analysis is whether a ballot is “valid” under Minnesota law. *See Bush v. Gore*, 531 U.S. 98, 105 (2000) (whether a vote is “legal” is a question to be resolved under state law, not federal constitutional law). Minnesota law provides that a vote is “valid” if it is possible to determine the “voter’s intent” according to specific statutory criteria. *See* Minn. Stat, § 204C.22(1); *see also Fitzgerald v. Morlock (“Fitzgerald II”)*, 120 N.W.2d 339, 347-54 (Minn. 1963).

the Court limited to mathematics as Franken now contends, the statutory language of § 209.12 would be rendered meaningless.<sup>2</sup>

The predecessor statute and the case law interpreting it confirm this analysis. The jurisdiction conferred by § 209.12 on U.S. Senate races is identical to the jurisdiction conferred by former § 209.10 over election contests related to the Minnesota state legislature. Compare Minn. Stat. § 209.12, with *Fitzgerald v. Morlock* (“*Fitzgerald I*”), 120 N.W.2d 336, 338 (Minn. 1963) (quoting former Minn. Stat. § 209.10, subd. 1). In *Fitzgerald II*, the Minnesota Supreme Court reviewed the actual ballots at issue for voters’ intents, *id.* at 347-53, made findings about “irregularities” in the ballot markings and resolved all issues necessary to determine the final vote tally and to award the certificate of election. *Id.* at 354. *Fitzgerald II* demonstrates that a contest court, with the same jurisdiction conferred by § 209.12, is empowered to resolve all “irregularities” necessary to determine the number of votes legally cast. Accord *Holmen*, 206 N.W.2d at 921-22 (election for state representative); *O’Ferrall*, 1858 WL 2544, at \*3 (election for state senator).

The contest court must be empowered to do so in order to implement Minnesota’s “well-established policy of giving effect to the votes of legal voters regardless of irregularities in the election.” *Johnson*, 154 N.W.2d at 187; accord *Fitzgerald II*, 120

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<sup>2</sup> Although Section 209.12 provides that the Court shall “make no findings or conclusions” on any points specified in the notice of contest other than the number of “legally cast” votes, it authorizes the Court to “take[] and preserve[] evidence on those issues for certification to Congress.” Such issues might include systemic inconsistencies, evidence of willful and material violations of election law and related matters.

N.W.2d at 524 (“if [a voter] complies with the law his right to vote cannot be defeated by reason of irregularities, ignorance, inadvertence, or mistake, or even intentional wrong on the part of the election officers.”). Franken’s interpretation of § 209.12 would eviscerate the meaning of “legally cast” by preventing this Court from addressing “irregularities” that would affect the final vote totals, regardless whether they occurred on the voting side (e.g., the determination of voters’ intents, as in *Fitzgerald II*) or on the counting side (e.g., mistakes in “counting, recording, and tabulation” of votes, as in *Holmen, Johnson, and O’Ferrall*).

While U.S. Const. art. I, § 5, vests final power in each house to determine who shall be seated as a member of Congress, U.S. Const. art I, § 4, by express language not only grants power but imposes a duty on the legislatures of the several states to enact laws governing the election process, including the conduct of senatorial elections. The Supreme Court has recognized the breadth of these powers. *See Smiley v. Holm*, 285 U.S. 355, 366 (1932). Minnesota has found, along with other states, that one procedure necessary to guard against irregularity and error in the tabulation of votes is the availability of a recount and an election contest. This is within the ambit of the broad powers delegated to the States by art. I, § 4. *See Roudebush v. Hartke*, 405 U.S. 15, 25-26 (1972) (“A recount does not prevent the Senate from independently evaluating the election any more than the initial count does. The Senate is free to accept or reject the apparent winner in either count and, if it chooses, to conduct its own recount.”).

The Minnesota Supreme Court has long since decided that the same constitutional argument Franken makes here does not apply under the Minnesota state constitution,

which also confers on the state legislature the power to judge and determine the elections of its own members:

Another position urged by the defense is, that, as by the constitution the senate is made the judge of the election and eligibility of its members, no other tribunal can or ought to take jurisdiction of the case. This position, we think, is sufficiently answered by the fact that this is not a proceeding to try the right of any party to the office of senator, but simply to determine whether the plaintiffs are entitled, at the hands of the defendant, to certificates of election to that office. Nor can our decision in the least affect the question of the election of either of the candidates. That question can be definitely settled by the senate alone.... All that we can do is to arm the parties entitled, with the credentials necessary to enable them properly to assert their rights before the proper tribunal.

*O'Ferrall*, 1858 WL 2544, at \*6.

Franken's reliance on *Odegard v. Olson*, 119 N.W.2d 717 (Minn. 1963), is in error. *Odegard* was decided before Minn. Stat. § 209.12 was enacted. The Court's holding was based on the fact that Minnesota law, at the time, did not provide for an election contest for the office of a member of the United States Congress, *id.* at 720, and as such Minnesota had not yet exercised its authority under U.S. Const. art. I, § 4. As Chief Justice Knuston noted in his concurring opinion:

This does not mean that the legislature, if it saw fit, could not confer upon the court the right to supervise an election contest or recount of the ballots in order to determine who was legally elected. As long as the recount is part of the election process, it would be just as much within the constitutional power granted to the state as any other step in the elective process. The difficulty here is that our legislature has not included a recount of the votes, with or without supervision of the courts, as part of the election process with respect to a Representative in Congress.

*Id.* at 446. Following *Odegard*, the Minnesota legislature passed § 209.12 to provide a constitutional process for a recount and an election contest supervised by the courts as part of the election process for Representatives in Congress.

The plain language of the statute, then, as well as Minnesota case law from previous election contests, confirm this Court's power to make meaningful, judicial decisions on which votes are legally cast and accordingly should be counted – and counted only once.

**B. The Supreme Court's Recent Orders Confirm This Court Is the Appropriate Forum for Contestants' Challenges**

The Minnesota Supreme Court has repeatedly held this Court is the appropriate forum for resolving the issues pleaded in the Notice of Contest. *See Coleman v. Ritchie*, -- N.W.2d --, 2009 WL 20954, at \*2 (Minn. Jan. 5, 2009); *Coleman v. Minn. State Canvassing Board*, -- N.W.2d --, 2008 WL 5352937, at \*2 (Minn. Dec. 24, 2008) (Langdon Aff., Ex. C); *Coleman v. Ritchie*, 758 N.W.2d 306, 307-08 (Minn. 2008). On December 24, 2008, the Minnesota Supreme Court declined to rule on the double-counting issue, Notice ¶ 12(a), on the ground that it would be better addressed by a contest court:

The dispute is 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. We do not and cannot decide that question based on the record presented in this abbreviated proceeding.

Because the resolution of petitioner's claim that double-counting of votes will result from including unmatched original damaged ballots in the recount is better suited to an

evidentiary hearing and fact-finding . . . the relief requested by petitioner is denied.

*Minn. State Canvassing Board*, 2008 WL 5352937, at \*2. Then, on January 5, 2009, the Minnesota Supreme Court declined to rule on the absentee ballot issue, Notice ¶¶ 10-11, on the same grounds:

[In our December 18, 2008 Order] we observed that, where election officials and the parties agree that an absentee ballot was improperly rejected, correction of that error should not have to await an election contest. We therefore ordered that any absentee ballot envelope that local election officials and the candidates agree was rejected in error should be opened and its ballot counted, subject to challenge by either candidate. In doing so, ***we implicitly recognized that any agreement among the parties was voluntary and, absent such an agreement, resolution of those disputed ballots would need to await an election contest proceeding.***

*Coleman v. Ritchie*, 2009 WL 20954, at \*2 (emphasis added). Indeed, the Supreme Court expressly provided that the “merits” of any disputes over the inclusion of “additional ballots” in determining the highest number of votes legally cast for U.S. Senator “are the proper subjects of an election contest under Minn. Stat. ch. 209.” *Id.*

Most recently, the Supreme Court referred a petition filed by 64 voters who seek an order directing that their absentee ballots be opened and counted, to this Court for resolution. *Langdon Aff. Ex. D* (Jan. 16, 2009 Order). In doing so, the Court noted:

The relief sought in the petition requires a determination whether the absentee ballot submitted by each petitioner complied with the legal requirements for such ballot and was therefore improperly rejected by local election officials. ***Judicial efficiency and the interests of justice will be better served if the claims presented in this matter are address by the three-judge district court panel in the election contest.***

*Id.* at 1.

The Minnesota State Canvassing Board, at Franken's urging, likewise deferred consideration of these issues to an election contest, as the following remarks by Board members reflect:

I might just observe that as much as we have made it clear that we want to count all legally cast ballots, I don't want to count ballots twice. And I am sensitive to the fact that there appears to be an issue that there is double counting. ***I'm just not sure that it's an issue that we have the ability to resolve. But it's an issue that's gotta be resolved. There should not be double counting. And I think that we're simply arguing about in what forum that issue is dealt with.*** And I still . . . don't understand how I can, without considering evidence extrinsic to the ballots, make a decision as to whether a particular ballot was counted more than once. I don't know how I can do that.

Magnuson, C.J., transcribed from Dec. 17, 2008 video at 4:26:50 p.m. (emphasis added) (available at [http://www.house.leg.state.mn.us/htv/archivessem.asp?ls\\_year=85](http://www.house.leg.state.mn.us/htv/archivessem.asp?ls_year=85)).

I think I agree with where the Chief Justice was going, and I'm still not convinced that this will not take factual determinations that are beyond the scope of what it is we are doing here, so . . . I don't think anybody loses anything – ***it's just a question of forums and I think that's what he said. I think the forum is an election contest, if that comes to be.***

Cleary, J., transcribed from Dec. 17, 2008 video at 4:34:18 p.m. (emphasis added).

***I think those – like other factual issues – are matters for an election contest.***

Anderson, J., transcribed from Dec. 17, 2008 video at 4:36:49 p.m. (emphasis added).

The Supreme Court's holdings, and the comments by the Chief Justice, Judge Cleary, and Judge Anderson during their service on the canvassing board, confirm the extent of the jurisdiction granted this Court under § 209.12.

**C. Franken Is Estopped To Deny This Court's Jurisdiction To Resolve Contestants' Claims.**

Although parties frequently take alternative positions in any adversary proceeding, there comes a point at which a complete about-face becomes intolerable. Franken's position now that this Court has no real judicial power is such a circumstance. Having argued repeatedly that the issues pleaded in the Notice could not be resolved by the canvassing board and should await a contest proceeding, he is now judicially estopped from contending, now that the recount shows him purportedly ahead, to take the opposite stance. *Bauer v. Blackduck Ambulance Ass'n, Inc.*, 614 N.W.2d 747, 749-50 (Minn. Ct. App. 2000).

A few examples of Franken's earlier arguments for the opposite of the position he now takes, Franken Br. at 11-12, will suffice:

- Franken urged the Canvassing Board to defer consideration of all "incident-based" challenges because those types of issues were "the proper subjects of an election contest proceeding where witnesses can be called and cross-examined, evidence can be weighed, and a fact-finder can decide questions of law and fact." Langdon Aff. Ex. E at 2. Franken reserved his own right to call an election contest over the same types of challenges that Notice of Contest alleges: "While the Franken Committee preserves its right to pursue "incident-based" challenges, it is prepared to waive all such challenges at this time (and to preserve them for an election contest, should one be filed by either campaign) . . ." *Id.* at 19.
- In a subsequent brief to the Minnesota Supreme Court, Franken argued that "an election contest is the proper forum" to resolve Coleman's claims due to their "intensely factual and speculative nature." Langdon Aff. Ex. F at 25. Once again, Franken argued, citing *Hancock*, that "[q]uestions resolvable by reference to evidence beyond the ballots and the information submitted by the counties are regularly considered by the courts in election contests in Minnesota." *Id.*

Other Franken briefs contain similar examples.

The canvassing board and the Supreme Court agreed with Franken in that respect—fact-bound matters such as whether rejected absentee ballots, save those on which all interested parties could agree, should be opened and the votes counted and whether votes in fact had been inadvertently counted twice, should be resolved by a contest court. Having successfully championed that position, Franken cannot now, as in a Catch 22 circumstance, urge the opposite.

**D. The Notice Of Contest Is Sufficient Under Minn. Stat. § 209.021.**

Contrary to Franken’s argument, the Notice sufficiently states the grounds on which the contest will be made. *See* Minn. Stat. § 209.021, subd. 1 (“[t]he notice of contest must specify the grounds on which the contest will be made”). “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.” *Greenly v. Indep. Sch. Dist. No. 316*, 395 N.W.2d 86, 90 (Minn. Ct. App. 1986).

The Notice complies with § 209.021 in that it specifies the grounds on which the contest will be made. *See* Notice ¶¶ 9-21. The Notice clearly states facts sufficient to apprise Franken as to the asserted claims. *See, e.g.*, Notice ¶¶ 10-11 (discussing absentee ballots); ¶ 12(a) (alleging that ballots were counted twice); ¶ 12 (c) (discussing missing ballots). The parties have lived with these issues through an intensive recount process and know them intimately; there are no surprises here. As a result, the Notice is more than sufficient to put Franken on notice of the specific ways Contestants believe the number of “legally cast” votes was miscalculated.

Indeed, the Minnesota Supreme Court has found notices far less specific than the one here to be sufficient. *See, e.g., Holmen*, 206 N.W.2d at 921-22 (notice of election contest which contested the result certified as erroneous because of irregularity and mistake in the counting, recording, and tabulation of the vote within the precincts was sufficient to confer jurisdiction). In *Holmen*, the notice of contest stated as follows:

Contestant contests the results so certified by the State Canvassing Board as erroneous because of irregularity and mistake in the counting, recording, and tabulation of the vote within the precincts and by the county auditors involved, and in the canvas of votes, and contends that in fact he and not contestee received the highest number of votes legally cast as said election for said office so that he and not contestee has been elected.

*Id.* at 921. The Supreme Court rejected contestee's claim that this language was statutorily inadequate. *Id.* at 922; *see also Moon v. Harris*, 142 N.W. 12, 13 (Minn. 1913) (notice which stated that the contestant received a plurality of the votes and that the ballots were erroneously counted and returned was sufficient and justified the court in ordering an inspection of the ballots).

Unlike the Notice in this matter, the notices in the cases Franken cites did not apprise the contestee of the facts on which the contestant relied for pursuing the election contest. *See Rachner v. Growe*, 400 N.W.2d 749, 752 (Minn. 1987) (notice did not sufficiently apprise contestee of any facts upon which contestant relied for a claim that "irregularities" resulted in an unfair election); *Greenly*, 395 N.W.2d at 89, 91 (notice simply stated "due to the alleged voting violations that seemed to occur" contestant "wish[es] to contest the results"); *Hancock v. Lewis*, 122 N.W.2d 592, 594 (Minn. 1963)

(irregularities alleged in notice would not entitle contestant to have the election results nullified and notice failed to allege how irregularities deprived voters of chance to vote); *Christensen v. Allen*, 119 N.W.2d 35, 37 (Minn. 1963) (notice only stated that “[p]laintiff has reason to believe that possible errors could have occurred in counting of ballots”); *Soper v. Bd. of County Comm’rs*, 48 N.W. 1112, 1112 (Minn. 1891) (notice that a number of voters were prevented from casting their votes “by violence and threats” was too general). Under general civil procedures, which this Court must follow “so far as possible,” Minn. Stat. § 209.065, a motion to dismiss must be denied if it is possible on any evidence which might be produced, consistent with the pleader’s theory, to grant the relief demanded. *Northern States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (1963). A motion to dismiss should be granted only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded. *Id.* All fact inferences are drawn in favor of the claimant in determining whether a claim will withstand a motion to dismiss. *Id.* If any theory of recovery is available to the claimant on the claim as stated, the motion to dismiss must be denied.<sup>3</sup>

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<sup>3</sup> Minnesota is a notice-pleading state that does not require absolute specificity in pleadings. *Meyer v. Best S. Seville Plaza Hotel*, 562 N.W.2d 690, 692 (Minn. Ct. App. 1997) (citing Minn. R. Civ. P. 8.01). Instead of absolute specificity, Minnesota requires that a pleading include a sufficient basis of facts to give fair notice to the opposing party of the claims raised against it. *Id.* A motion to dismiss for failure to state a claim will rarely be granted because of the minimal formal requirements of notice pleading and the liberal interpretation of pleadings under the Rules. 1 David F. Herr and Roger S. Haydock, *Minnesota Practice Civil Rules Annotated* § 12.9, at 283 (3d ed. 1998).

Here, the Notice complies with § 209.021 and each of the claims falls under § 209.12. It also meets the requirements of Rule 8 and applicable case law. Therefore, the Notice is sufficient to confer jurisdiction on this Court to resolve each of the stated claims.

## **II. THE NOTICE OF CONTEST STATES A CLAIM UPON WHICH RELIEF MAY BE GRANTED**

Franken's argument that the Notice of Contest fails to state a claim upon which relief may be granted fails. First, as discussed above, all of the claims within the Notice of Contest relate to which candidate received the "highest number of votes legally cast" as required under Minn. Stat. § 209.12. As such, all claims are within the jurisdiction of this Court. Second, the Court is equipped to remedy such claims by properly allocating the votes legally cast in the General Election in favor of Contestant Norm Coleman and Contestee Al Franken. If the Court determines that Norm Coleman received more votes than Al Franken, the Court must order that a certificate of election be issued to Norm Coleman.

Contestants below address three of the main claims in the Notice of Contest: (1) improperly rejected absentee ballots, (2) double counting of ballots, and (3) counting of missing ballots. Each of these claims is sufficiently stated in the Notice, are within this Court's jurisdiction, and can be remedied under Minnesota law.

### **A. Improperly Rejected Absentee Ballots**

The Notice of Contest alleges that certain absentee ballots were improperly rejected and were not counted on election day or during the recount. Notice ¶¶ 10-11.

Pursuant to orders of the Minnesota Supreme Court, the Secretary of State opened and counted 933 absentee ballots which had been previously rejected by local election officials. That still leaves nearly 12,000 absentee ballots that were rejected and therefore never counted. Contestants maintain that a very large number of these remaining ballots were improperly rejected by local election officials and, in accordance with Minnesota's longstanding policy of seeking to enfranchise voters, should be counted. These include not just the 654 ballots Contestants identified during the recount process but thousands more. This fact comes as no surprise to Franken — both parties have had copies of all 12,000 envelopes for weeks and Franken himself, in his First and Second Counterclaims, seeks to have hundreds of them opened.

If an absentee ballot rejected by a local election official substantially complies with the dictates of Minn. Stat. § 203B.12, subd. 2, it is a legally cast vote and must be counted by this Court whether or not the Franken campaign, Coleman campaign or local election officials agreed to such counting during the recount process. *See Coleman v. Ritchie*, 2009 WL 20954, at \*2 (“we implicitly recognized that any agreement among the parties was voluntary and absent such an agreement, resolution of those disputed ballots would need to await an election contest proceeding”); *see also* Langdon Aff. Ex. D (Jan. 16 Order referring issue of 64 absentee ballots to this Court).

“To fail to count these ballots [improperly rejected absentee ballots] would contradict past practice and statute, improperly disenfranchise voters, and could allow ‘the loser to become the winner in spite of the vote of the people.’” (*Citing In re Application of Andersen v. Donovan*, 119 N.W. 2d 1, 12 (Minn. 1962)). Indeed this Court

should uniformly review the previously rejected absentee ballot envelopes and open those which were not rejected for a statutorily-permissible reason in order to avoid violations of the Equal Protection Clause of the United States Constitution. *See Bush v. Gore*, 531 U.S. at 105-106 (concluding that the recount mechanisms implemented in Florida “do not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right” because the command to consider the “intent of the voter” provided no “specific standards to ensure . . . equal application”).

In sum, the Notice states a claim as to whether any rejected absentee ballot is a vote that was “legally cast” and should be counted.

#### **B. Double-Counting of Ballots**

The principle of “one person, one vote” is a hallmark of the United States Constitution; no person is entitled to two (2) votes. *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (“[t]he conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote”) (internal quotation omitted); *Bush v. Gore*, 531 U.S. 98, 105 (2000) (“The right of suffrage can be denied by a debasement or the dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise”). The Notice alleges the canvassing board certified a result whereby a candidate received two votes for one ballot (by counting an original and unmarked duplicate during the Recount). That issue can and should be remedied by this Court, as the Minnesota Supreme Court directed, *Coleman v.*

*Minn. State Canvassing Bd.*, 2008 WL 5352937, at \*2, because the double-counted vote is *not* a “vote legally cast.”

Whether such double-counting occurred is a matter for this Court in determining which party “received the highest number of votes legally cast.” The Notice accordingly states a claim on which relief can be granted.

### **C. Missing Ballots**

The Notice alleges certain ballots in Minneapolis Ward 3, Precinct 1 were included in the recount totals even though the ballots were missing. Notice ¶ 12(c). Certification of “results” relative to ballots which were not located during the recount results in certification of votes which were not “legally cast,” even if suspicion exists that such ballots indeed existed at some point but have now been destroyed or gone missing (whether intentionally or inadvertently). Minn. Stat. § 204C.35 (requiring a manual hand-recount). If a ballot is missing, has no foundation, or its chain of custody is suspect, that ballot cannot serve as the “best evidence” of how the person casting that ballot voted on election day. *See, e.g., Newton v. Newell*, 26 Minn. 529, 6 N.W. 346 (1880) (where ballots have not been carefully preserved so as to place their identity beyond a reasonable doubt, they can not be relied upon in a subsequent recount); *see also DeBroux v. Board of Canvassers for the City of Appleton*, 557 N.W.2d 423 (Wis. Ct. App. 1996) (ballots which were unsecured at print shop for a week lacked proper foundational basis to be counted and tallied in recount). A ballot without such preservation or for which an identity cannot be established beyond a reasonable doubt should not be counted.

Minnesota law clearly recognizes such a claim and a remedy for it. The Notice accordingly states a claim this Court may consider.<sup>4</sup>

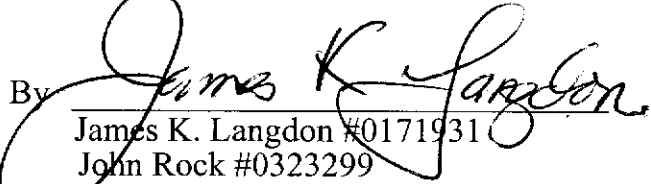
**CONCLUSION**

For the reasons set forth above, Contestants respectfully request that the Court deny Contestee's Motion to Dismiss.

Dated: January 17, 2009

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<sup>4</sup> Similarly, the Notice has sufficiently specified the remaining issues for the contest, including the fact that previously opened absentee ballots may have represented a voter's second vote, as was determined to be the case with respect to several of the ballots among the group of 1342 submitted by the counties as wrongly rejected, and ballots for which there is no evidence to show they were properly secured, both of which fall within the ambit of determining whether a ballot was legally cast.