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By OX Deputy

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STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT
CASE TYPE: CIVIL OTHER

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,

Case No. 62-CV-09-56

Cullen Sheehan and Norm Coleman,

Contestants,

**CONTESTEE'S MEMORANDUM IN
OPPOSITION TO MOTION FOR ORDER
DIRECTING SECRETARY OF STATE TO
DEPOSIT ORIGINAL DOCUMENTS WITH
THE COURT**

vs.

Al Franken,

Contestee.

Contestee Al Franken ("Franken") opposes Contestants' motion for an order directing the Secretary of State to deposit 933 original ballots, incident reports, and recount summary statements with the Court, for four reasons.

First, as to the 933 ballots, the motion may be entirely unnecessary. Before the Court further considers this motion, it should require Coleman to state his current position on whether the 933 ballots opened on January 3, 2009, should or should not be included in the count. Coleman's position on this issue has shifted frequently. Perhaps now he again agrees that the 933 ballots were and are properly counted. If so, then there is no need to move the ballots from the Secretary of State's Office.

Moving original ballots is no inconsequential matter and should not be ordered by the Court absent compelling reasons. Here, all parties have ample access to evidence necessary to address the issues in this contest and – at this point – perhaps both parties

agree that these ballots were properly opened and counted. Accordingly, the motion should be denied.

Second, the motion is procedurally defective. If Coleman needs any kind of evidence, whether ballots, incident reports, or recount summaries, for trial, his vehicle to obtain the evidence is a subpoena under Minn. R. Civ. P. 45. Procedures are available under Rule 45 for the person responding to the subpoena or other parties.

Third, even if this motion were the proper vehicle, there is no good reason for it. The purported reason for the motion is Minn. R. Evid. 1002, which provides that an original writing is required to prove the content of a writing. However, Minn. R. Evid. 1003 provides that duplicates are admissible to the same extent as originals, unless there is a question as to the authenticity of the original or it would be unfair to use a duplicate. Coleman has not even attempted to make such a showing.

Franken is prepared to stipulate that copies of absentee ballot envelopes may be used in lieu of originals, subject to all other objections. If there is any unusual issue, such as whether any particular copy accurately reflects the original, that can be handled on an individualized basis. None has been raised to date. If a particular ballot needs to be retrieved, the Secretary of State's Office is a short walk from the Minnesota Judicial Center.

Finally, the proposed order is defective because it does not provide for ballot secrecy. The Minnesota Supreme Court Order of December 24, 2008, specifically provided that the candidates would not have access to "any portion of the ballot that might identify the origin of the ballot" When the ballots were opened on January 3, 2009, Coleman insisted that the ballots and the envelopes be tied in some fashion, and

ultimately the Secretary of State created a numbering system. The proposed order contains no provision to maintain voter secrecy. Moving the ballots and exposing them to scrutiny from the candidates and/or the public would violate one of the most fundamental principles of our election system. *See, e.g., Elwell v. Comstock*, 109 N.W. 698, 699 (Minn. 1901) (describing ballot secrecy as a constitutional mandate); *Matter of Contest of School Dist. Election*, 431 N.W.2d 911, 915 (Minn. Ct. App. 1988) (describing the “purpose and intent behind absentee voting legislation” as, *inter alia*, “the preservation of the secrecy of the ballot”).

For all of these reasons, the motion to order the Secretary of State to deposit documents should be denied.

Dated: January 21, 2009

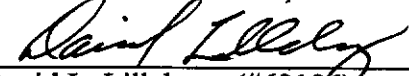
Respectfully submitted,

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