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Court Administrator

STATE OF MINNESOTA		DISTRICT COURT
COUNTY OF RAMSEY	FEB 24 2009	SECOND JUDICIAL DISTRICT

By CVC Deputy

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 DENYING CONTESTANTS' MOTION FOR TEMPORARY INJUNCTION**

Cullen Sheehan and Norm Coleman,

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

Contestants,

vs.

Al Franken,

Contestee.

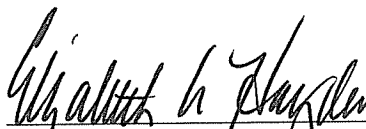
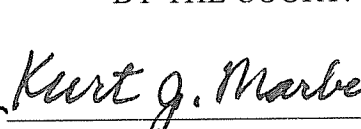
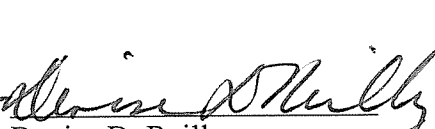
The above-entitled matter came before the Court upon Contestants' Motion for Temporary Injunction. Counsel noted their appearances on the record. The Court having heard and read the arguments of counsel, and the files, records, and proceedings herein, makes the following:

**ORDER**

1. Contestants' Motion for Temporary Injunction is DENIED.
2. The Court's Memorandum, filed herewith, is incorporated herein.
3. Any other relief not specifically ordered herein is DENIED.

**IT IS SO ORDERED.**

BY THE COURT:

		
Elizabeth A. Hayden Judge of District Court	Kurt J. Marben Judge of District Court	Denise D. Reilly Judge of District Court

Dated this 24 day of February, 2009.

## MEMORANDUM

### I. Introduction

Approximately 2.9 million Minnesota citizens cast a ballot on Election Day. Of these, roughly 286,000 voters cast absentee ballots. Election officials rejected roughly 12,000 absentee ballots, 5,600 of which are at issue in this election contest and remain unopened and uncounted. This represents far less than one percent of the total number of ballots cast by Minnesota citizens in the 2008 election. Norm Coleman challenged the manner in which local election officials determined which absentee ballots would be opened and counted. In response, the Minnesota Supreme Court ordered the candidates, their respective campaign representatives and the Secretary of State, in conjunction with county auditors and canvassing boards, to “establish and implement a process, as expeditiously as practicable, for the purpose of identifying all absentee ballot envelopes that the local election officials and the candidates agree were rejected in error.” *Coleman v. Ritchie*, 758 N.W.2d 306, 308 (Minn. 2008). The Minnesota Supreme Court ordered that:

Any absentee ballot envelopes so identified that the local election officials and the candidates agree were rejected in error shall be opened, the ballot shall be counted, and its vote for United States Senator added to the total votes cast for that office in that precinct.

*Id.*

Local election officials identified approximately 1,350 unopened absentee ballots that were likely rejected in error. The candidates and their respective campaign representatives ultimately agreed that 933 of the identified rejected absentee ballots should be opened and counted. These absentee ballot return envelopes were delivered to the Secretary of State and opened and counted on January 3, 2009. Upon Contestants’ request, each of the 933 absentee

ballot return envelopes and the ballots contained therein were marked with identifying numbers so that the ballot could be traced back to its original absentee ballot return envelope.

This matter is before the Court upon Contestants' Motion for Temporary Injunction filed with the Court on February 20, 2009. Contestee filed a memorandum in opposition to Contestants' motion on the same date. The parties appeared before the Court on February 20, 2009. Contestants seek injunctive relief pursuant to Rule 65.02 of the Minnesota Rules of Civil Procedure enjoining the Secretary of State's Office from redacting the identifying numbers on the absentee ballot return envelopes associated with the 933 ballots opened and counted on January 3, 2009 until the Court can determine the impact of its February 13, 2009 Order.<sup>1</sup>

## **II. A Binding Stipulation and Court Order Govern the Legal Status of the 933 Ballots Opened and Counted on January 3, 2009**

On February 3, 2009, the parties entered into a stipulation in which they agreed that the 933 absentee ballots opened and counted on January 3, 2009 were "properly and lawfully opened and counted," and the results were "properly and lawfully included in the results of the 2008 United States Senate election as certified by the Minnesota State Canvassing Board." (Order Feb. 3, 2009.) Accordingly, Contestants "dismiss[ed] with prejudice all claims in the Notice of Contest relating to the 933 Ballots." (Id.) The parties further agreed that the Court should direct the Secretary of State to "take all necessary steps to remove and/or redact permanently the numbers affixed to the ballot envelopes on January 3, 2009." (Id. at 2.) The terms of the parties' agreement were acceptable to the Secretary of State. The parties' agreement was thereafter memorialized in the Court's Order issued February 3, 2009.

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<sup>1</sup> On February 13, 2009, the Court issued an Order determining as a matter of law that certain categories of absentee ballots that did not comply with Minnesota Statute were "not legally cast under relevant law." (Order Feb. 13, 2009 at 17.) The Order advised the parties that the Court would "not order the counting of any of the ballots falling within these categories." (Id.) This matter is presently the subject of a motion filed with the Court by Contestants and will be addressed at the appropriate time.

The binding stipulation and Order of February 3, 2009 are dispositive of Contestants' motion. Both campaigns have been competently and ably represented by counsel throughout these proceedings. The stipulation was drafted by counsel and signed by sophisticated parties familiar with the subject matter. The Court presumes the parties were apprised of the risks and benefits associated with entering into this agreement. At the parties' behest, the Court adopted the parties' stipulation in its totality and incorporated those findings into the Court's Order of February 3, 2009.

The parties' stipulation, and the Court's Order arising therefrom, is binding. The agreement was reached and submitted to the Court for its adoption after thoughtful negotiation by sophisticated and knowledgeable participants. The Court further analyzed Contestants' motion pursuant to the *Dahlberg* factors, discussed in greater detail below. In reviewing Contestants' motion in light of *Dahlberg*, the Court finds the public interest in ensuring the fundamental right to secrecy of a voter's ballot and the importance of upholding contract law weighs against granting Contestants' motion for injunctive relief.

### **III. Legal Standard**

"A decision on whether to grant a temporary injunction is left to the discretion of the court and will not be overturned on review absent a clear abuse of that discretion." *Carl Bolander & Sons Co. v. City of Minneapolis*, 502 N.W.2d 203, 209 (Minn. 1993). An injunction is an equitable remedy, and therefore the party seeking it must demonstrate that there is no adequate legal remedy and that the injunction is necessary to prevent irreparable harm. *Cherne Indus., Inc., v. Grounds & Assocs., Inc.*, 278 N.W.2d 81, 92 (Minn. 1979); *see also Miller v. Foley*, 317 N.W.2d 710, 712 (Minn. 1982); *Integrated Dev. & Mfg. Co. v. University of Minn.*, 363 N.W.2d 845 (Minn. Ct. App. 1985). The granting of a temporary injunction is intended to

preserve the status quo pending adjudication on the merits. *See Metro. Sports Facilities Comm'n. v. Minn. Twins P'ship*, 638 N.W.2d 214, 220 (Minn. Ct. App. 2002), *rev. denied* (Minn. Feb. 4, 2002).

In evaluating a request for a temporary injunction, Minnesota courts analyze five factors to determine whether such a grant is appropriate:

1. The nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief;
2. The harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial;
3. The likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief;
4. The aspects of the fact situation, if any, which permit or require consideration of public policy expressed in the statutes, State and Federal; and
5. The administrative burdens involved in judicial supervision and enforcement of the temporary decree.

*Dahlberg Bros. v. Ford Motor Co.*, 137 N.W.2d 314 (Minn. 1965).

#### **IV. Contestants' Motion for Injunctive Relief Is Denied**

##### **a. The Relationship Between the Parties**

Contestants Cullen Sheehan and Norm Coleman ("Contestants") 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. The parties are involved in an election contest before the undersigned three-judge panel for a determination of "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.” Minn. Stat. § 209.12; *Coleman v. Ritchie*, 758 N.W.2d 306, 310 -311 (Minn. 2008)(“[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.”).

A temporary injunction is issued to maintain the status quo until the case can be decided on the merits. *Metropolitan Sports Facilities Com'n v. Minnesota Twins Partnership*, 638 N.W.2d 214, 221 (Minn. App. 2002); *Pickerign v. Pasco Marketing, Inc.*, 228 N.W.2d 562, 564 (Minn. 1975). The objective of the temporary injunction is to maintain the matter in controversy in its existing condition until judgment, so that the effect of the judgment shall not be impaired by the acts of the parties during the litigation. *Berggren v. Town of Duluth*, 304 N.W.2d 24, 27 (Minn. 1981). In this instance, the parties have already taken action with respect to the 933 ballots opened and counted on January 3, 2009. Specifically, the parties entered into a stipulation regarding the posture of these ballots. The Court incorporated this agreement into its February 3, 2009 Order. Thus, the controversy, as it initially existed with respect to these 933 ballots, was effectively mooted by the parties’ stipulation and the Court’s subsequent Order. Based upon information provided to the Court, the Secretary of State has already begun the process of permanently redacting the identifying numbers affixed to the absentee ballot return envelopes in accordance with the Court’s February 3, 2009 Order. This factor weighs against injunctive relief.

**b. Balancing the Potential for Harm**

The second *Dahlberg* factor requires the Court to balance “the harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the

injunction issues.” *Dahlberg Bros*, 137 N.W.2d at 314. The party seeking an injunction must establish that legal remedies are inadequate and that an injunction must issue to prevent great and irreparable injury. *Metropolitan Sports Facilities Com'n.*, 638 N.W.2d at 222; *Cherne Indus., Inc.*, 278 N.W.2d at 92 (“Because a preliminary injunction is granted prior to a complete trial on the merits, a showing of irreparable harm is required to prevent undue hardship to the party against whom the injunction is issued, whose liability has not yet been determined.”). However, a “mere statement [that one] is suffering or will suffer irreparable injury, without more, is not enough to support a claim for injunctive relief.” *Carl Bolander & Sons Co.*, 502 N.W.2d at 209.

Here, Contestants argue they stand to suffer irreparable harm if the injunction is not granted because without the identifying information on the ballot envelopes, “the Court will be unable to determine which ballot was in fact an illegally cast vote and should not be included in the count of legally cast votes.” (Contestants’ Mem. at 3.) The Court does not accept this argument. The fundamental right to secrecy of a voter’s ballot acts to ensure that no person or body, including this Court, knows whether the 933 ballots at issue cut in favor of Contestants or Contestee. The Court cannot sincerely hold as a matter of law that the balance of harms favors one campaign over another.

Further, Contestee will be prejudiced if the Court does not uphold the binding stipulation entered into between the parties. Perhaps most importantly, the Court finds the voters of Minnesota stand to suffer irreparable harm if the Court grants Contestants’ motion. Minnesota law recognizes “the right of the people to express their preference in a free election by secret ballot and to have the results of the election governed by the votes so cast.” *Application of Anderson*, 119 N.W.2d 1, 8 (1962); *see also* Minn. Stat. §§ 202A.18, 206.80. Contestants cannot establish that a temporary injunction is necessary to prevent irreparable harm.

**c. Likelihood of Success on the Merits**

There is insufficient evidence in the factual record before the Court at this stage to find that Contestants have established a likelihood of success on the merits. Injunctive relief is limited to clear cases, reasonably free from doubt, and only when necessary to prevent great and irreparable injury. *Geske v. Marcolina*, 642 N.W.2d 62, 67 (Minn. Ct. App. 2002). The burden is on the moving party to establish the material allegations. *Id.* Contestants have not adequately demonstrated to the Court a reasonable probability of success. *See Queen City Construction, Inc., v. City of Rochester*, 604 N.W.2d 368 (Minn. Ct. App. 1999).

Here, the relationship between the parties with respect to the 933 ballots opened and counted on January 3, 2009 is governed by reference to the stipulation and Order of February 3, 2009. A stipulation between the parties to a lawsuit “is contractual in nature.” *Ryan v. Ryan*, 193 N.W.2d 295, 297 (Minn. 1971). In the absence of fraud or bad faith, the Minnesota Supreme Court recognizes that vacating stipulations “would be an injustice both to the courts in which settlements were made, and to the litigants involved, who depend on the reliability of such settlements.” (*Id.* at 298.) Contestants have not alleged, and there is no evidence in the record to suggest, that the stipulation entered into between these two sophisticated parties cannot stand in equity. *See Schoenfeld v. Buker*, 114 N.W.2d 560 (Minn. 1962)(placing the burden on the moving party to show a stipulated agreement is “improvident or unconscionable”); *see also Metropolitan Sports Facilities Com'n v. General Mills, Inc.*, 470 N.W.2d 118, 125 (Minn. 1991)(“[S]ophisticated parties, presumably with the assistance of experienced and able counsel, exercised their liberty of contract and now are accountable for the product of their negotiations.”).

The Court emphasizes that its analysis with respect to the instant motion does not involve a determination on the merits of the case as a whole, and nothing in this Order shall be construed as a definitive holding on the merits of the claims raised in the Notice of Contest or in the Answer and Counterclaims.<sup>2</sup> *See, e.g., Lano Equipment, Inc. v. Clark Equipment Co., Inc.*, 399 N.W.2d 694, 699 (Minn. Ct. App. 1987); Minn. R. Civ. P. 52.01. Contestants' allegations notwithstanding, it is unclear at this stage whether Contestants will succeed on the merits of their case. For that reason, this factor weighs in favor of denying Contestants' motion for injunctive relief.

**d. Public Interest**

Under the fourth factor, the Court must consider the aspects of the fact situation, if any, which permit or require consideration of public policy expressed in the statutes, State and Federal. *Dahlberg Bros.*, 137 N.W.2d 314. Contestants assert that there is a strong public interest in "ensuring that illegally cast votes are not counted in determining which party received the highest number of legally cast votes." (Contestants' Mem. at 5.) The Court agrees. However, preserving the identifying marks on the envelopes associated with the 933 ballots counted on January 3, 2009 does not effectuate that purpose. There is a strong public interest in ballot secrecy. Additionally, "[c]onfidence in the integrity of our electoral process is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). The Court also recognizes the "strong public policy in favor of finality in elections." *McNamara v. Office of Strategic and Long Range Planning*, 628 N.W.2d 620, 631 (Minn. Ct. App. 2001)(citing *Greenly v. Independent Sch. Dist. No. 316*, 395 N.W.2d 86, 91 (Minn. Ct. App. 1986)).

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<sup>2</sup> Specifically, nothing in this Order shall be viewed as a statement of the Court's opinion on Contestants' equal protection argument. The Court will set forth its findings of fact with respect to this issue at an appropriate time.

Minnesota law has long-recognized that “public policy requires that freedom of contract remain inviolate except only in cases when the particular contract violates some principle which is of even greater importance to the general public.” *Rossman v. 740 River Drive*, 241 N.W.2d 91, 93 (Minn. 1976)(citing *James Quirk Milling Co. v. Minneapolis & St. L. R. Co.*, 107 N.W. 742 (Minn. 1906)). Public policy favors the enforcement of valid contracts. *See, e.g., Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 113 (8<sup>th</sup> Cir. 1981). As discussed above, the Court is not convinced that Contestants have made a “clear case” showing the necessity of injunctive relief.

**e. Administrative Burden**

With regard to the fifth factor, the administrative burdens involved in judicial supervision and enforcement of a temporary decree are minimal. *Dahlberg Bros.*, 137 N.W.2d 314. Thus, this is a neutral consideration that neither favors nor weighs against issuing an injunction. *See Road Constructors, Inc. v. City of Rochester*, 2003 WL 282390, \*4 (Minn. Ct. App. 2003).

**V. Conclusion**

For the aforementioned reasons, Contestants’ motion for a temporary injunction is denied.