STATE OF MINNESOTA DISTRICT COURT

COUNTY OF OLMSTED THIRD JUDICIAL DISTRICT

Al Franken for Senate Committee and
Al Franken,

Applicants,

vs. **ORDER**

Olmsted County including its Auditor and its
County Canvassing Board,

Respondents. Court File CV-08-11879

The above-entitled matter came on for hearing before the Honorable Nancy Bostrack, Judge of District Court, on December 16, 2008 at the Olmsted County Courthouse in Rochester, Minnesota. Attorney Steven Kaplan appeared on behalf of Applicants Al Franken for Senate Committee and Al Franken. Attorney Frederic Knaak appeared on behalf of Intervenor Coleman for Senate '08 Committee and Norm Coleman without objection of any of the parties. Assistant Olmsted County Attorneys Brent Walz and Thomas Canan appeared on behalf of the Respondent Olmsted County, including its Auditor and its County Canvassing Board.

Upon reading and filing the Application for Correction of Obvious Errors in the 2008 United States Senate Campaign, hearing testimony from County Elections Administrator Pam Fuller, hearing the arguments of counsel and reviewing all of the files, records, and proceedings herein, the Court, being duly advised in the matter, makes the following:

FINDINGS OF FACT

1. Applicants requested that 27 rejected absentee ballots from Olmsted County be opened and counted.

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2. Said ballots were initially marked as "accepted," then later were rejected and placed among the other rejected absentee ballots.
3. On Tuesday, December 2, 2008 and pursuant to further "detailed instructions" on Thursday, December 4, 2008, the Minnesota Secretary of State directed all Minnesota counties to go through all of the rejected absentee ballots and sort them into categories, essentially to determine whether any of those ballots were in fact wrongfully rejected.
4. On December 12, 2008, the Minnesota State Canvassing Board unanimously passed a resolution that recommended, but did not require, Minnesota county canvassing boards re-canvass for the purpose of evaluating whether or not any absentee ballot envelopes in a county relating to the 2008 general election were improperly rejected by election judges and/or absentee ballot boards. The resolution did not provide guidance to county election officials on how to determine whether or not any absentee ballot envelopes relating to the 2008 general election were improperly rejected by election judges and/or absentee ballot boards, whether or not these ballots would need to remain segregated from other ballots after being reviewed, and/or what the challenge process would be should either of the candidates wish to challenge any rejected absentee ballots.
5. Norm Coleman and the Norm Coleman for Senate '08 Committee requested that the Minnesota Supreme Court review this directive from the Minnesota State Canvassing Board and provide some uniform and objective procedures for reviewing rejected absentee ballot envelopes as well as a mechanism to preserve necessary evidence in the event of an election contest under Minnesota Statutes Chapter 209A, or alternatively to delay the counting process until an election contest.

6. The Minnesota Supreme Court issued a scheduling order on December 15, 2008 in which it indicated, among other things, that "any county election official or canvassing board that opens any previously rejected absentee ballots prior to a ruling by this court on petitioner's request for interim relief shall implement a system by which a reviewing authority may identify and locate the specific ballot that was removed from a particular set of return and ballot envelopes."
7. The Minnesota Supreme Court heard oral argument on the matter on December 17, 2008. The Court is deliberating on this matter, and a decision has yet to be issued.
8. Olmsted County has determined that the 27 ballots in question here are among the ballots that fall within the category of rejected absentee ballots that the Secretary of State recommended to be reviewed and the Minnesota State Canvassing Board recommended for further evaluation.
9. The Olmsted County Canvassing Board had intended to open all of these ballots at a meeting on Tuesday, December 13, 2008 at 1:00 p.m., but that meeting was postponed pending further direction from the Minnesota Supreme Court.

CONCLUSIONS OF LAW

1. The Minnesota Supreme Court has been asked to review and is currently deliberating on the matter of rejected absentee ballots; specifically the lack of a uniform set of guidelines for re-canvassing them, keeping them segregated from other ballots, and a process for challenging the rejected absentee ballots. This Court defers to the Minnesota Supreme Court's impending decision on the issue of rejected absentee ballots.

ORDER

1. Applicants' motion asking the Court to find that the election judges in Olmsted County erroneously failed to count the 27 absentee ballots is hereby DENIED.
2. Applicants' motion seeking an Order directing the Olmsted County Canvassing Board to reconvene to open and count the 27 absentee ballots is hereby DENIED.

DATED: Dec. 18, 2008

BY THE COURT:

Nancy L. Bostrack
District Court Judge