

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF DAKOTA

FIRST JUDICIAL DISTRICT

Case Type: Other Civil

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Tyler Kistner, Thomas Settell, Leilani Holmstadt, Dan Hall, Jose W. Jimenez, Fern A. Smith, Mariah de la Paz, Cynthia Lonquist, Pam Myhra, Megan Olson, Sandra A. Jimenez, Deborah Coxe, and Greg Buck,

Court File No.: 19AV-CV-20-2183

Contestants,

v.

**ANDY LOKKEN'S  
MEMORANDUM OF LAW IN  
SUPPORT OF HIS MOTION TO  
DISMISS**

Steve Simon, only in his official capacity as the Minnesota Secretary of State, Andy Lokken, only in his official capacity as the Elections Director for Dakota County, Angie Craig, Matt Klein, Karla Bigham, Lindsey Port, Greg Clausen, Liz Reyer, Rick Hansen, Ruth Richardson, Jessican Hanson, Robert Bierman, and John D. Huot,

Contestees.

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**INTRODUCTION**

This case arises out of the general election that took place on November 3, 2020, in which Tyler Kistner, Thomas Settell, Leilani Holmstadt, Dan Hall, Jose W. Jimenez, Fern A. Smith, Mariah de la Paz, Cynthia Lonquist, Pam Myhra, Megan Olson, and Sandra A. Jimenez (collectively “**Losing Candidates**”), ran for public office and lost, and in which Deborah Coxe and Greg Buck presumably voted for the Losing Candidates (collectively referred to with the Losing Candidates as

“**Contestants**”). Contestants filed a notice of election contest claiming election-related irregularities mostly based upon far-reaching, far-fetched conspiracy theories and facts identified in an affidavit authored by their attorney who is apparently acting as a witness and an advocate in the same case in violation of Minnesota Rule of Professional Conduct 3.7. Despite Contestants’ cries of foul, their notice of election contest is a nullity and insufficient to invoke the jurisdiction of this Court, so the Court should dismiss it.

Because an election contest is solely a creature of statute, the courts only have jurisdiction to hear a contest if the underlying notice of election contest—the procedural tool used to commence an election contest—strictly complies with the requirements of the election-contest statute, Minnesota Chapter 209. Contestants’ notice of election contest failed to comply with Chapter 209 in two ways, which robs this Court of jurisdiction over Mr. Lokken.

First, Contestants improperly named the Mr. Lokken as a party and Mr. Lokken joins the Secretary of State in its arguments regarding the same. Chapter 209 identifies the proper parties to an election contest. It identifies voters and parties seeking election who lost and subsequently contest the election (called “contestants”) and parties who sought election and won (called “contestees”). Chapter 209 does not permit parties other than those identified above. (except that the Secretary of State in circumstances not applicable here; the Secretary of State should not be a party to this case either). Nevertheless, Contestants named Mr. Lokken as a contestee. Because Chapter 209 does not provide Contestants that right, this Court lacks

jurisdiction over the Mr. Lokken and the Court should dismiss the notice of contest against him.

Second, although Contestants allege a variety of election-related irregularities, they do not allege that but-for the claimed irregularities, the Losing Candidates would have won the election and similarly, do not request a decree from this Court changing the declared election result. Because Chapter 209 requires that a notice of election contest allege that but-for the complained-of activities, the contestants would have won the election, this Court lacks jurisdiction over Mr. Lokken and the Court should dismiss the notice of contest against him.

### **STANDARD OF REVIEW**

In deciding motions to dismiss for failure to state a claim upon which relief can be granted, courts accept the facts alleged in the complaint as true and then apply those facts to the law.<sup>1</sup> Courts are not, however, bound by legal conclusions contained in the complaint.<sup>2</sup>

### **ARGUMENT**

#### **I. THIS COURT DOES NOT HAVE JURISDICTION OVER MR. LOKKEN**

“Since both the right to contest an election and the authority of courts to hear and determine an election contest are purely statutory [created by Minnesota Statutes Chapter 209], absent compliance with the statutory requirements, courts are

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<sup>1</sup> See *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003).

<sup>2</sup> *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010).

powerless to entertain such proceedings.”<sup>3</sup> Said differently, a contestant’s failure to strictly comply with Chapter 209 robs the district court of subject-matter jurisdiction. As discussed below, because Contestants improperly named Mr. Lokken as a party and because they failed to allege in their notice of election contest that but-for the claimed election-related irregularities, the Losing Candidates would have won the election, this Court lacks jurisdiction over Mr. Lokken.

**A. Contestants violated Chapter 209 by improperly naming Mr. Lokken as a party**

Chapter 209 indicates that the only permissible parties to an election contest are “contestants” and “contestees.”<sup>4</sup> “Contestants” are eligible voters who contest the election of a person who won an election and for whom they had a right to vote.<sup>5</sup> “Contestees” are the candidates who won the election and whose election the contestants are challenging.<sup>6</sup> Here, Mr. Lokken is not a contestee because he is not a candidate who won an election that Contestants are contesting. Thus, Mr. Lokken is not a proper party to this action. Because Chapter 209 only confers jurisdiction to this Court over proper parties and Mr. Lokken is not a proper party, this Court lacks jurisdiction over Mr. Lokken.

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<sup>3</sup> *Schmitt v. McLaughlin*, 275 N.W.2d 587, 590 (Minn. 1979)

<sup>4</sup> *See generally* Minn. Stat. § 209.021 (2020).

<sup>5</sup> Minn. Stat. § 209.021, subd. 1(1) (2020).

<sup>6</sup> Minn. Stat. § 209.021, subd. 3 (2020).

**B. Contestants do not allege that the claimed irregularities would change the result of the election or that they are entitled to a decree changing the result of the election**

In *Christenson v. Allen*, the Minnesota Supreme Court held that a notice of election contest does not confer jurisdiction upon the courts when it does not contain specific allegations of irregularities in voting and ballots and that the contestant was entitled to a decree changing the declared election result.<sup>7</sup> In *Christenson*, the contestant and contestee were opposing candidates for state senator.<sup>8</sup> Shortly after the contestee was declared the winner, the contestant filed a notice of election contest claiming that irregularities occurred but did not specify them.<sup>9</sup> The contestee moved to dismiss, alleging that the courts lacked jurisdiction because the notice of election contest failed to allege “... that if such errors had not been made, contestant would have received a plurality of the votes cast.”<sup>10</sup> The Minnesota Supreme Court agreed, holding as follows:

... we are constrained to hold that a notice of contest designed to limit the contest to a recount of the votes cast, which fails to allege any [specific] irregularities [or]... by a plain statement show[] that the contestant is entitled to a decree changing the declared election result of the election, is a nullity and insufficient to invoke the jurisdiction of the court.<sup>11</sup>

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<sup>7</sup> 119 N.W.2d 35 (Minn. 1963).

<sup>8</sup> *Christenson*, 119 N.W.2d at 36.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 37.

<sup>11</sup> *Id.* at 40-41.

Subsequent cases have taken this ruling further and have held that even if the contestant alleges specific irregularities, the notice of election contest is still a nullity and insufficient to invoke the jurisdiction of the court if it does not allege that but-for the irregularities, the contestant would have won the election, and requests a decree changing the declared election result.<sup>12</sup>

Here, Contestants' notice of election contest is a nullity and insufficient to invoke the jurisdiction of the Court because it did not allege that that but-for the claimed irregularities, the Losing Candidates would have won the election. First, the Contestants limit their notice of contest to a recount of the votes cast when they allege as follows:

Every illegitimate absentee ballot case in the November 3, 2020 election disenfranchises one legitimate vote. This cannot be tolerated and Contestants respectfully request that this court remedy this injustice by allowing a true count of the legally cast votes by the eligible voters in Dakota County.<sup>13</sup>

Second, glaringly absent from Contestants' notice of election contest is any allegation that the claimed irregularities would have changed the outcome of the elections or a request for a decree changing the declared election results. Accordingly, as stated in *Christenson and Holmen*, the notice of election contest is a nullity and insufficient to invoke the jurisdiction of this Court.

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<sup>12</sup> *Holmen v. Miller*, 206 N.W.2d 916, 922 (Minn. 1973).

<sup>13</sup> (Notice of Contest at 23.)

Contestants cannot cure their flawed pleading by amending their notice of election contest because the time to file notices of election contests has passed. A contestant has seven (7) days after the completion of the canvass to file a notice of election contest.<sup>14</sup> Once that deadline passes, a contestant may not amend their pleading to correct a deficiency that caused that pleading to fail: “If the original notice was invalid, it could not be validated by amendment after expiration of the statutory period of filing the original notice in this case.”<sup>15</sup> Here, the canvass was completed—at the latest—on November 24, 2020. Seven (7) calendar days from November 24, 2020, was December 1, 2020. Because it is now past December 1, 2020, the Contestants cannot amend their notice of election contest to correct the deficiency noted above.

### **CONCLUSION**

For the reasons set forth above, Andy Lokken respectfully requests that the Court dismiss the notice of election contest against him because this Court does not have jurisdiction over him. Should the Court deny this motion, because Mr. Lokken filed it in lieu of an answer, he will serve and file an answer.

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<sup>14</sup> Minn. Stat. 209.021, subd. 1.

<sup>15</sup> *Schmitt*, 275 N.W.2d at 590.

Dated: December 4, 2020

**JAMES C. BACKSTROM**  
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**ACKNOWLEDGMENT**

The party above-named represented by the undersigned, hereby acknowledges that sanctions may be imposed pursuant to Minn. Stat. § 549.211.

/s/William M. Topka  
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