

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF DAKOTA

FIRST JUDICIAL DISTRICT

CASE TYPE: Civil Other/Misc.

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

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

Contestants,

**CONTESTANTS' MEMORANDUM
OPPOSING CONTESTEE STEVE
SIMON'S MOTION TO DISMISS**

v.

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,
Jessica Hanson, Robert Bierman,
and John D. Huot,

Contestees.

Contestants oppose Secretary of State Steve Simon's ("the Secretary's") motion to dismiss him from this election contest. This court has subject matter jurisdiction over the Secretary because of his pivotal role in the administration of the November 3, 2020

election in Dakota County. The Secretary is also a proper party under Rules 19.01 and 20.01 of the Minnesota Rules of Civil Procedure.

The citizens and voters in Dakota County deserve fair elections untainted by violations of the United States Constitution, the Minnesota Constitution, and Minnesota Election Law. They deserve openness in the election process which was denied by both the Secretary and his agent, Dakota County Elections Manager, Andy Lokken. The relief requested by Contestants requires the inclusion of the Secretary as a party-contestee to this action.

PROCEDURAL POSTURE

This election contest involves state legislative offices of several candidates. On December 2, 2020, the Dakota County Court Administer served Chief Justice Gildea with a copy of this election contest as required by Minn. Stat. § 209.10, subd. 1.¹ Minn. Stat. § 209.10, subd. 2, describes the procedure for the selection of the judge for the election contest. The Minnesota Supreme Court has not yet submitted a list of district judges to the parties. Consequently, the parties have not selected a judge to preside over this matter. Therefore, the appointment of the Honorable Jerome B. Abrams for the Secretary's motion to dismiss is premature.

FACTS

Secretary's Election Duties

The Secretary has enormous duties with regard to the November 3, 2020, state general election that are implicated in this election contest. He is responsible for election

¹ Fourth Affidavit of Jane L. Volz, Ex. A, hereinafter "Fourth Volz Aff."

emergency plans under Minn. Stat. § 204B.181 which were triggered by COVID19 concerns denying the public from observing and participating in this election.

The Secretary provides the forms and instructions required for this and all elections to ensure that all voters are treated equally and fairly. Minn. Stat. § 204B.27, subd. 1. He provides the county auditors and municipal clerks, including Andy Lokken, with “detailed written instructions for complying with election laws relating to the conduct of elections, conduct of voter registration and voting procedures.” Minn. Stat. § 204B.27, subd. 2. Mr. Lokken takes his direction from the Secretary and has very little discretion in administering the election in Dakota County.

The Secretary adopts rules for the conduct of mail balloting, including instructions to voters, procedures for challenge of voters, public observation of the counting of ballots, and procedures for proper handling and safeguarding of ballots to ensure the integrity of the election. Minn. Stat. § 204B.45, subd. 3. As discussed below, the Secretary is also a member of the State Canvassing Board.

Secretary’s Actions with regard to 8th Circuit’s Decision

On October 29, 2020, the 8th Circuit Court of Appeals, in *James Carson, et. al. v. Steve Simon, et al.*, required the Secretary “and his respective agents and all persons acting in concert with each or any of them are ordered to identify, segregate, and otherwise maintain and preserve all absentee ballots received after the deadlines set forth in Minn. Stat. § 203B.08, subd. 3 . . . in the event a final order is entered by a court of competent jurisdiction determining such votes to be invalid or unlawfully counted.”²

² Second Affidavit of Jane L. Volz, filed November 30, 2020, ¶ 4, Ex. A, hereinafter “Second Volz Aff.”

The Secretary stated he disagreed with the 8th Circuit’s ruling and “there may be cause for litigation later.”³ He stated he would *count* all votes received after November 3, 2020 despite the 8th Circuit’s decision.⁴

In Dakota County during the post-election review held pursuant to MN Stat. 206.89, the absentee ballots were mixed up with the polling place ballots and there was no distinction between the two.⁵ According to the Secretary’s website, on November 10, 2020 in Dakota County, there were 173,560 absentee ballot requests and 160,481 accepted absentee ballots.⁶ There is no data as to how many absentee ballots were rejected. The Secretary’s website states that he will not publish the data until six weeks after the election.⁷ Hence, Contestants will have no factual means for verifying how many votes were actually valid before this court rules if the Secretary is not compelled to stay in and to produce this data.

Secretary’s Actions with regard to the State Canvassing Board

The Secretary is a member of the State Canvassing Board. Minn. Stat. § 204C.31, subd. 2. The board met on November 24, 2020, at 2:00 pm. The board meeting was required to be open to the public under the open meeting laws. Minn. Stat. § 204C.33, subd. 3 (“The State Canvassing Board shall meet at a public meeting space located in the Capitol complex area”). The Secretary failed to comply with Minn. Stat. § 204C.33, subd. 3, and only allowed the public to hear the meeting through an audio feed. To hear the meeting, you were required to called in to a specified number and identify

³ Fourth Volz Aff., Ex. B.

⁴ *Id.*, Ex. B & C.

⁵ Affidavit of Jane L. Volz, Nov. 23, 2020, ¶ 10, hereinafter “First Volz Aff.”

⁶ Fourth Volz Aff., Ex. D

⁷ Fourth Volz Aff., Ex. E.

yourself.⁸ There was no ability for the public or candidates to make comments at this very important public meeting and no mention of the emergency Dakota County Canvassing Board meeting⁹ that occurred at 11:30 a.m. that same day, or the November 20th emergency canvassing board meeting.¹⁰

Secretary's Actions Regarding Consent Decrees

The Secretary, in concert with the Democratic-Farmer-Labor party operatives and Governor Walz, dramatically changed the process for handling absentee ballots without the approval or direction of the Minnesota Legislature.¹¹ Even though there were at least three special legislative sessions after the stipulated agreements were imposed by the Minnesota Supreme Court. These changes, made under the guise of social distancing due to COVID19, eliminated the witness requirements for absentee voting and extended the date for accepting and counting absentee ballots.¹²

Contestants' Relief Requested

Contestants seek (1) guarding of the absentee ballots and all related election materials pursuant to Minn. Stat. § 209.05; (2) inspection of the absentee ballots under Minn. Stat. § 209.06 and all election materials related to the ballots including: (a) all

⁸ *Id.*, ¶ 9.

⁹ Second Volz Aff., Ex. C & D.

¹⁰ In the 2008 election contest between Norm Coleman and Mark Ritchie, the Al Franken for Senate campaign were allowed to comment during the canvassing board meeting. Franken's team "urged the Board to review all rejected absentee ballots return envelopes" to determine if any absentee ballots were improperly rejected. *Norm Coleman, et al. v. Mark Ritchie, Minnesota Secretary of State, et al.*, Court File A08-2169 (Minn. March 6, 2009). This was an errors and omissions complaint filed under Minn. Stat. § 204B.44 after the 2008 State General Election. Secretary of State Mark Ritchie was a party to the action. In the November 24, 2020 canvassing board meeting, no one was able to comment or ask questions.

¹¹ Second Volz Aff., Nov. 30, 2020, Exhibits F, G, & H.

¹² *Id.*

return envelopes by precinct; (b) all absentee ballot applications by precinct; (c) all voter registration applications by precinct; (d) all documents to support the absentee ballots that were rejected but later cured; (e) description of the procedures followed for the security, sealing, and storage of absentee ballots (f) all information regarding the chain of custody for all absentee ballots and envelopes; (g) the reconciliation of all absentee ballot requests including the applications, whether they were returned, whether they were rejected or accepted; (h) voting machine tapes to support the absentee ballot count by precinct including the cutoff of election day receipts of absentee ballots; (3) guarding of the Dominion Voting machine delivered to Dakota County on or about November 11, 2020, as well as the ability to inspect the machine; (4) all information regarding that same Dominion Voting machine including the purchase order, bill of lading, shipping invoices, instruction manual, training protocols, software used and version of the software, maintenance reports, specifications, and when it was used; (5) a list of all Dominion voting systems used in Dakota County; (6) the names and political affiliation of all persons who served on the Ballot Boards in Dakota County and any training they may have received and oaths administered; (7) the names of all of the PER counters, their party affiliation, their employer, their training, if any, for the PER, and any oaths they swore to prior to performing the PER.

Contestants also seek the details surrounding the solicitation and acceptance by Mr. Lokken and the County Supervisors of the \$613,000.00 funds received by the CTCL on or about October 6, 2020 as all revenue accepted by any county in Minnesota must be

authorized by the Minnesota legislature.¹³ At the very least, public comment should have been solicited before the funds were used just three weeks before the election to avoid any appearance of impropriety

Contestant Leilani Holmstadt is a legislative candidate for the State Senate seat in District 54. Her district covers two counties, Dakota and Washington. In the interest of judicial economy, she is confining her contest to the irregularities in Dakota County and on the grounds of deliberate, serious and material violations of Minnesota Election Law.¹⁴

I. THE COURT HAS SUBJECT MATTER JURISDICTION OVER THE SECRETARY IN THIS CONTEST.

The Secretary argues the Court lacks subject-matter jurisdiction over the election contest as to the Secretary. “Subject matter jurisdiction refers to a court's authority or power to consider an action or to issue a ruling that will dispose of the issues raised.” 1

¹³ Second Volz Aff., Ex. J & K.

¹⁴ The Secretary states Ms. Volz’s representation of the Contestants may be a violation of Rule 3.7(a) of the Minnesota Rules of Professional Conduct because she submitted eyewitness testimony of the Dakota County post-election reviews. The general rule concerning testimony by attorneys, as stated by the Minnesota Supreme Court, is that a lawyer should not testify unless circumstances arise which are not anticipated and unless his or her testimony is necessary to prevent a miscarriage of justice. In the rare case where the attorney's testimony is needed to protect the client's interest, not only may the attorney testify--justice requires that he do so. *Schwartz v. Wenger*, 267 Minn. 40, 124 N.W.2d 489 (1963). If she became a necessary witness, she can continue to participate in pre-trial activities. Also, there are several exceptions to Rule 3.7(a). If the testimony is uncontested, or if the disqualification “would work substantial hardship on the client.” Minn. R. Prof. Conduct 3.7(a)(1) and (a)(3). If the lawyer's testimony is merely cumulative, or quite peripheral, or already contained in a document admissible as an exhibit, ordinarily the lawyer is not a necessary witness and need not recuse as trial counsel. *Humphrey on Behalf of State v. McLaren*, 402 N.W.2d 535 (Minn. 1987). The rule requires balancing the client's interests against those of the tribunal and the opposing party. Minn. R. Prof. Cond. 3.7(a) cmt 4.

Minnesota Practice § 12.5, D. Herr & R. Haydock (4th ed. 2002). Here, the court cannot dispose of the Contestants' issues in this case without the Secretary as a party.

The Secretary erroneously argues Minn. Stat. § 209.021, subd. 3, only allows candidates to be contestees. Minn. Stat. § 209.021 relates to “notice” of the election contest. While Minn. Stat. § 209.021, subd. 3, requires the Secretary to be the contestee if the contest relates to a constitutional amendment, it does not preclude the Secretary from being a contestee.

The Secretary attempts to weave in words like “strictly” and “only” in an attempt to rewrite Minn. Stat. § 209.021, subd. 3.¹⁵ This provision does not state it “strictly limits” individuals who can be named a contestee. Nor does it state “only” candidates can be contestees.

The Secretary misstates the law regarding Rule 12 motions to dismiss. He states “factual allegations in the complaint are entitled to *some* deference” citing *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010).¹⁶ The Minnesota Supreme Court in *Bahr* actually held: “When conducting [a Rule 12 motion review] we ‘consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party.’” *Id.* (citing *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008)); *see also Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014) (The court must “accept the facts alleged in the complaint as true and construe all reasonable inferences in favor of the nonmoving party”).

¹⁵ Secretary's memo. p. 4.

¹⁶ *Id.*, p. 3. (emphasis added).

The Secretary’s reliance on *In re Contest of General Election Held on November 4, 2014, for the Purpose of Electing a United States Senator from the State of Minnesota*, No. 62-CV-14-7915, Order at 5-6 (Ramsey Cty. Dist. Ct. Dec. 30, 2014) (“2014 U.S. Senate Contest”), *appeal dismissed*, No. A14-2201 (Minn. Jan. 15, 2015), is misplaced. District court orders have no precedential value and govern only the rights of the parties to the litigation. *See Green v. BMW of N. Am., LLC*, 826 N.W.2d 530, 537 n. 5 (Minn. 2013) (“That the district court orders lack precedential value ... informs the weight we will give them.”); *Kmart Corp. v. Cnty. of Stearns*, 710 N.W.2d 761, 769–70 (Minn. 2006).

Carlson’s appeal does not affirm Ramsey County’s order creating any precedent.¹⁷ The appellate court dismissed his appeal due to the uncorrected deficiencies in his filing.¹⁸ Unlike the instant case, Carlson did not challenge the accuracy or legality of the canvassing returns. Therefore, the Secretary cannot rely on *Carlson* for any precedent in his current motion to dismiss.

Contestant Leilani Holmstadt is voted on in more than one county, Dakota and Washington. With the removal of the language “voted on in more than one county” in Minn. Stat. § 209.021, subd. 3., Minnesota Election Law is silent on how candidates can challenge an election when more than one county is involved. Therefore, the Secretary, should be required to be a contestee if more than one county is involved and the contestant chooses challenge only one of the counties.

¹⁷ Declaration of Nathan J. Hartshorn, Ex. 1.

¹⁸ *Id.*, Ex. 2.

The Secretary is the chief elections official in Minnesota, responsible for administering Minnesota's election laws. He has a relevant role in the events that led to this contest. He changed the rules under the guise of COVID19 without the approval of the Minnesota legislature. He provides detailed instructions to the election officials for complying with election laws. He adopts rules for mail balloting, instructions to voters, procedures for challenge of voters, and the procedures for the proper handling and safeguarding of ballots to ensure the integrity of the election.

The Secretary chose to count votes received after election day even though the 8th Circuit stated those ballots should be segregated. Dakota County, however, just mixed them all up. The Secretary's actions with regard to the Dakota County emergency canvassing board meeting just hours before the State Canvassing Board meeting are also implicated in this contest. The Secretary's actions with regard to the consent decrees warrants his presence in this contest.

II. JOINDER RULES WARRANT THE INCLUSION OF THE SECRETARY AS A PARTY TO THIS ACTION.

Given the Secretary's significant role in this election contest, he is a proper party under both Rules 19.01 and 20.01 of the Minnesota Rules of Civil Procedure. Rule 19.01 provides “[a] person who is subject to service of process shall be joined as a party in the action if (a) in the person's absence complete relief cannot be accorded among those already parties[.]” Minn. R. Civ. Proc. 19.01. Similarly, the Secretary is a permissive party under Rule 20.01 which provides in part:

All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any

question of law or fact common to all defendants will arise in the action.

Minn. R. Civ. P. 20.01. Joinder rules, “reflect [] pragmatic concerns for the efficient use of judicial resources.” *State Auto. & Cas. Underwriters v. Lee*, 257 N.W.2d 573, 575 (Minn. 1977); *see also Bacich v. Northland Transp. Co.*, 173 Minn. 538, 540, 217 N.W. 930, 931 (1928) (in explaining statutory authority for joinder, noting that joinder of multiple defendants may be permissible even though all defendants may not be “equally interested in or affected by the action,” but were “all interested in” the issues raised by plaintiff’s claim for relief) (citations and internal quotation marks omitted). The Secretary’s involvement in and direct responsibility for election administration are inextricably intertwined in the Contestants’ requests for relief.

III. MULTIPLE CONTESTANTS CAN BRING ONE ELECTION CONTEST.

The Secretary finally argues that an election contest can only have a single contestant and contestee.²⁰ The Secretary fails to cite any case law supporting this notion. The policy of judicial economy and the prevention of multiple actions on similar issues overrides any opinion that requires separate election contests for separate voters or candidates. *See, e.g., Personalized Marketing Service, Inc. v. Stotler & Co.*, 447 N.W.2d 447 (Minn. App. 1989) (reflecting court’s disfavor with multiple lawsuits for the same cause of action and wasteful litigation).

Numerous election contests have been brought with more than a single contestant and single contestee in Minnesota. *See, e.g., Aura, et al. v. Brandt*, 299 N.W. 910 (Minn. 1941) (two contestants); *Hanson, et al. v. Village of Adrian, et al.*, 148 N.W.276 (Minn.

²⁰ Secretary Memo. p. 5.

1914) (election contest by John H. Hanson and others against five contestees); *In re Contest of General Election*, 767 N.W.2d 453 (Minn. 2009) (both Cullen Sheehan and Norm Coleman were contestants against Al Franken).

CONCLUSION

The Court has subject matter jurisdiction over Secretary of State Steve Simon and under Minnesota's joinder rules. The relief requested by the Contestants requires the participation of the Secretary in this election contest. Therefore, Contestants respectfully request that the Court deny the Secretary's motion to be dismissed from this contest.

The undersigned hereby acknowledges that sanctions may be awarded pursuant to Minnesota Statutes § 549.211.

DATED: December 4, 2020.

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