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November 29, 2010

Eric J. Magnuson
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VIA E-MAIL AND U.S. MAIL

Alan Gilbert
Solicitor General
Minnesota Attorney General's Office
445 Minnesota Street
Suite 1100
St. Paul, MN 55101

**Re: In re Petition regarding 2010 Gubernatorial Election
Client Matter No. 09760.00001
Court File Number: Appellate Case No. A10-2022**

Dear Mr. Gilbert:

I enclose a letter for delivery to the State Canvassing Board. Because they are represented by your office, unless you direct us to communicate with them directly, we will continue to submit matters for their consideration through you. Please let me know if you have any questions.

Very truly yours,

Briggs and Morgan, P.A.

A handwritten signature in black ink, appearing to read "Eric J. Magnuson", written over a horizontal line.

Eric J. Magnuson

EJM/kd
Enclosure
cc: Charles Nauen



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180 State Office Building
100 Rev. Dr. Martin Luther King Jr. Blvd.
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Honorable Paul H. Anderson
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25 Rev. Dr. Martin Luther King Jr. Blvd.
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Honorable David R. Stras
Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
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Honorable Denise D. Reilly
Hennepin County Government Center
300 South 6th Street
Minneapolis, MN 55487

Honorable Gregg E. Johnson
Ramsey County Courthouse
15 W. Kellogg Blvd.
St. Paul, MN 55102

Re: Recount Plan / "Frivolous" Challenges

Dear Members of the Minnesota State Canvassing Board:

I write on behalf of Tom Emmer and Emmer for Governor concerning the Board's decision to segregate and defer consideration of challenged ballots where the local election officials deem the challenge frivolous.

We have reflected on the revisions that the Board adopted to the Recount Plan, specifically the changes to Rule 8, and the interplay between that rule as now written, and other parts of the recount plan.. As now written, Rule 8 provides:

8. If during the sorting, a candidate's representative disagrees with the recount official's determination of for whom the ballot should be counted and whether there are any identifying marks on the ballot, he or she may challenge the decision of which of the three piles the Table Official has placed a ballot and must describe why the decision is being challenged. A challenge must be made in accordance with Minnesota Statutes, section 204C.22. Challenges may not be made for an entire precinct or group of ballots. Challenges may not be automatic or frivolous. A challenge is frivolous if it is based upon an alleged identifying

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mark other than a signature or an identification number written anywhere on the ballot or a name written on the ballot completely outside of the space for the name of a write-in candidate. The absence of election judge initials on a ballot cannot be the basis of a challenge. The Table Official will reexamine the ballot to determine into which pile it should be placed. If a challenge is made to a ballot that is deemed by a Table Official to be frivolous the ballot shall be labeled with the precinct, the name of the candidate making the challenge, the reason for the challenge, and that the challenge was deemed frivolous. These ballots shall be recorded on the recount summary statement as part of the pile in which the Table Official intended to place the ballot, and shall also be recorded in a separate report to the State Canvassing Board. **These ballots shall be segregated and secured by the Deputy Recount Official for the precinct in a separate ballot envelope, and shall be forwarded if requested, to the secretary of state who will make 4 copies as provided for challenges.** If either candidate's representative does not agree with the Table Officials' final determination and the challenge has not been found to be frivolous, the ballot will be placed in one of two new piles of challenged ballots. One pile of challenged ballots will be for all ballots challenged by Candidate A's representative; the second pile of challenged ballots will be for all ballots challenged by Candidate B's representative. Challenges may be withdrawn at any time. (emphasis added)

Other pertinent parts of the plan state:

10. After counting for the precinct is completed, the Deputy Recount Official or designated Assistant Deputy Recount Officials may review challenged ballots with the candidates or candidates' representatives. They may withdraw previously challenged ballots. If challenged ballots are withdrawn, they are added to the proper pile and the counts are adjusted as needed

* * *

13. **At the end of each day, the Deputy Recount Official or Assistant Deputy Recount Official will make four copies of the recount summary, recount incident logs, and both sides of each challenged ballot.** One copy of each item will be retained by the Deputy Recount Official, one will be forwarded to the Office of the Secretary of State, and one copy will be provided to each Lead Representative for each candidate. If the Table Officials must leave the room to make the copies, they will be accompanied by each candidate's representative and the names of everyone who left the room with the ballots will be noted on the incident log. (emphasis added)

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Preparation for the next Canvassing Board Meeting on December 8th:

1. Challenged ballots will be presented to the Canvassing Board for resolution of the challenge on a county by county basis in an order to be determined by the State Recount Official. The order of counties will be made public by noon December 6th.

2. **To facilitate the review of challenged ballots by the Board, the State Recount Official may open the challenged ballot envelopes to remove those challenged ballots which have been withdrawn by each of the two candidates or their representatives after the precincts were recounted but prior to the next Board meeting.** The State Recount Official will arrange for this process to occur in an appropriate room and at an appropriate time and shall inform the candidates and the public of the time and location so that they may observe if they so desire. The State Recount Official may designate any members of the staff of the Office of the Secretary of State to assist in this task. At least two staff members must be present at all times during this process. (emphasis added)

The withdrawn challenged ballots shall be sealed into separately labeled envelopes for return to the jurisdiction from which they were received. The remaining challenged ballots shall be sealed into separately labeled envelopes and be kept secure for review by the board. The State Recount Official shall report to the Board the allocation of votes resulting from the withdrawal of these challenges.

We believe that, as currently written, Rule 8 conflicts with Rule 13 as shown by the emphasized language noted above. We also believe that it frustrates the ability of the candidates to satisfy Rule 2 relating to preparation for the December 8 meeting of the Canvassing Board with respect to withdrawing challenges. It is necessary for counsel to receive, as expeditiously as possible, copies of all ballots deemed by Recount Officials to be frivolous to enable adequate preparation for the State Canvassing Board meeting sessions regarding challenged ballots. Of course, this preparation includes the ability to withdraw challenges, which are permissible "at any time" pursuant to the last sentence of Rule 8. While we understand the Board's desire to avoid unnecessary effort and expense, access to all challenged ballots is essential for counsel to make appropriate decisions as to arguments before the Canvassing Board and to enable withdrawal by counsel of challenges which counsel determines should be withdrawn.

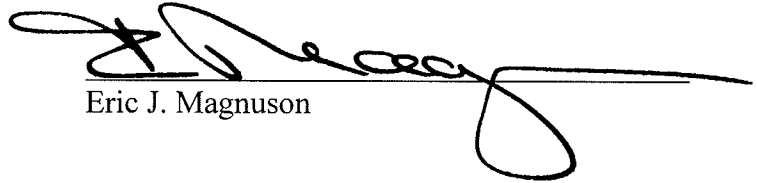
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Accordingly, this correspondence constitutes the "request" of Emmer for Governor pursuant to Rule 8 of the Procedures that Deputy Recount Officials an/or the Secretary of State provide the parties to the contest with copies of all challenged ballots deemed to frivolous by Deputy Recount Officials on a daily basis at the same time that other challenged ballots are photocopied and provided to the recount representatives. Thank you.

Very truly yours,

Briggs and Morgan, PA

A handwritten signature in black ink, appearing to read "Eric J. Magnuson", written over a horizontal line. The signature is stylized with a large loop at the end.

Eric J. Magnuson

EJM/wp

cc: Solicitor General Alan Gilbert, Esq.
Charles Nauen, Esq.