

STATE OF MINNESOTA

IN DISTRICT COURT

COUNTY OF RICE

THIRD JUDICIAL DISTRICT

Case Type: Other Civil

Benda for Common-sense, a Minnesota
Non-Profit Corporation, and Kathleen
Hagen,

Court File No. 66-CV-22-2022

Assigned to: The Honorable Carol M. Hanks

Plaintiffs,

vs.

**REPLY MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO PROHIBIT
USE OF UNCERTIFIED ELECTRONIC
VOTING SYSTEMS IN RICE COUNTY**

Denise Anderson, Director of Rice County
Property and Tax Elections,

Defendant,

and

Minnesota Secretary of State,

Proposed Intervenor – Defendant.

Plaintiffs, Benda for Common-sense and Hagen are entitled to an order on their Petition (Count III) for the Correction of Errors and Omissions under Minn. Stat. 204B.44. The Defendant and the Office of the Secretary of State (“OSS”) argue that substantial disruption of the election process would occur if the relief requested is granted. What this *sky is falling* argument ignores is that the scope of the petition is limited to prohibiting the use of modems in the Rice County election process.¹ There is no valid election disruption scenario presented by either Defendant Anderson or the OSS that will result from using optional modems that are used to transmit unofficial election results.

As admitted by the OSS, “No election hardware or software certified for use in Minnesota uses a modem to transmit official election results.” See Declaration of David Maeda

¹ The OSS mistakenly states that Plaintiffs request for relief includes a request to be “conducting the November general election by hand rather than with the certified ES&S optical ballot scanners....”

at paragraph 9.² If there is no “official” role for the imbedded, uncertified modems, there can be no disruption of the election process. The “optional” use of modems is further confirmed by Defendant Anderson when she states that the Rice County voting system has an “option to use a modem to transmit unofficial election results.” **Anderson Dec. 10-12-22** at paragraph 2. Plaintiffs submit that Defendant Anderson should be prohibited from exercising the “option” to use these uncertified modems for any purpose.

ISSUE AND PROCEDURAL STATUS

1. Whether Plaintiffs are entitled to an Order Prohibiting Rice County from using uncertified modem functions on their Electronic Voting Systems.

Plaintiffs have submitted a motion for summary judgment on its Petition for the Correction of Errors and Omissions under Minn. Stat. 204B.44. The treatment of this petition as a motion for summary judgment has strong precedence, as confirmed by the Minnesota Supreme Court. Butler v. City of St. Paul, 936 N.W. 2d 478 (Minn. 2019) (appeal following motion for summary judgment in district court). Defendant, Anderson argues for judicial treatment as a motion to dismiss for failure to state a claim under Rule 12 Minn. R. Civ. P. In the current procedural setting, however, a Rule 12 motion becomes a motion for summary judgement under Rule 56 Minn. R. Civ. P. The OSS makes an *all of the above* argument that either Rule 12 or Rule 56 is the appropriate procedural setting. **See** Intervenor-Defendant Secretary of State’s Response to Minn. Stat. 204B.44 Petition at Footnote 2.

² Paragraph 5 of The Answer of Rice County seems to contradict this statement, “The paper printout must be signed by three election judges and delivered to the County election offices and compared to the information transmitted via modem before the votes are certified.” This statement strongly suggests that the modemed election results are used as the official results once they are compared to the number of votes on the central system.

As provided in Rule 56, “The court shall grant summary judgment if the movant shows that there is no issue as to any material fact and the movant is entitled to judgment as a matter of Law.” Minn. R. Civ. P.

STATEMENT OF KEY UNDISPUTED FACTS

Plaintiffs have submitted a proposed order which accompanies its motion to Prohibit the Use of Uncertified Electronic Voting Systems. The basic facts remain the same but are even stronger than when the original motion was filed and served. The **bold** language is based upon the additional facts submitted by the Office of the Secretary of State:

1. Rice County currently utilizes Electronic Voting System machines referred to as DS-200s and DS-450, **EVS Version 5.3.4.1**. See Declaration of David Maeda, paragraph 8 and Exhibit D.
2. The DS-200s and DS-450 contain internal wireless modems.
3. All Electronic Voting Systems are required to be **examined and** certified by the Office of the Secretary of State pursuant to Minn. Stat. 206.57.
4. **The Office of the Secretary of State, “does not examine modems in any of its voting-system certification testing”** See Declaration of David Maeda, paragraph 11.
5. As required by Rice County Resolution #22-046, all Rice County election hardware and software must be “certified and approved” by “test labs

accredited by the U.S. Election Assistance Commission and undergo detailed additional testing by the Office of the Minnesota Secretary of State.”

6. The Electronic Voting Systems certification documents from the Office of the Secretary of State specifically state, “This certification does not cover any modeming functions **that may be related to the EVS 5.3.4.1 Voting System.** See Declaration of David Maeda, Exhibit B, page 2.
7. Defendant, Denise Anderson, intends to utilize and further instruct election officials to utilize the wireless modems on the DS-200s and DS-450 in upcoming elections.

As discussed below, the only material fact disputed by Defendant and the OSS is Key Undisputed Fact Number 3. They argue that all Electronic Voting System hardware, except modems need to be examined and certified.

ARGUMENT

I. DEFENDANT AND PROPOSED INTEVENOR HAVE NOT RAISED AN ISSUE OF MATERIAL FACT PREVENTING SUMMARY JUDGMENT

The only Key Undisputed Facts disputed by Defendant and OSS is paragraph 3 which reads: “All Electronic Voting Systems are required to be **examined and** certified by the Office of the Secretary of State pursuant to Minn. Stat. 206.57.”

In opposition to Plaintiff’s motion, Defendant Anderson submits her Declaration dated October 12, 2022. (“**Anderson Dec. 10.12.22**”). In this declaration, Defendant does not claim that the modems imbedded in the DS200s and DS450 are not part of the Electronic Voting System, but instead that the “modem is not part of counting ballots.” **Anderson Dec. 10.12.22** at

paragraph 3. The Secretary of State expands on this mistaken logic by submitting that while the imbedded modems are part of an “election system,” since they transmit “unofficial election results” they do not need to be inspected or certified. **Maeda Dec. 10.13.22** at paragraph 9. In order to reach the conclusion requested by Defendant and the OSS, the Court must be convinced that the label of “unofficial” excludes modems from the scope of the examination and certification requirements.

Further confusing matters, the opening sentence of the OSS memorandum states, “Minnesota Secretary of State Steve Simon tests and certifies every piece of electronic hardware and computer software used in elections in Minnesota.” In direct contradiction to this statement, the Secretary of State then confirms that the “OSS does not examine modems in any of its voting-system certification testing.” **Maeda Dec. 10.13.22** at paragraph 11. In other words, the OSS tests and certifies every piece of hardware used in elections, *except for modems*.

The existence of the “unofficial election results” label does not somehow physically separate the imbedded modems from the election system hardware. Likewise, there is no legal “exclusion” included in the definition of an Electronic Voting System. Minn. Stat. 206.56, subd. 8 (2006). Defendant and the OSS have presented no evidence of physical separation of the imbedded modems from the election system and have presented no statutory exclusion from the definition of EVS for modems that only transmit “unofficial election results.”

Lest the Defendant and Proposed Intervenor argue that Plaintiffs are making a mountain out of a mole hill, precedential value must be given to the Federal Agency overseeing election equipment certification, the Election Assistance Commission or “**EAC**.” Minn. Stat. 206.57, subd. 6. The **EAC** determined that ES&S misrepresented that its DS200 machines with modems were “EAC-certified.” Original Statement of Undisputed Facts at 4.4. In response to this

finding, the manufacturer, **ES&S** admitted, "... it was never the intent of ES&S to state or imply that the ES&S DS200 modeming capability was EAC certified" Id. at 4.5. ES&S even went so far as to send a letter to customers who use the DS200 with modem stating that they, "have not been certified by the EAC." Id. at 4.6. It is significant to note that Defendant Anderson did not deny receiving this letter.

It is an absurd proposition to accept that an entire national system of independent testing and certification of election systems can be blatantly ignored just for modem hardware which is known to present significant³ and on-going security threats⁴. Further, it is misleading for Defendant Anderson to continue to represent to the Rice County Commissioner's that the DS200s with Modems and the DS450 with Modem are "certified and approved."

These undisputed facts require the conclusion, "Defendant Anderson's intended use of the uncertified wireless modems imbedded in the DS-200s and DS-450 in upcoming elections is an "error" under Minn. Stat. 204B.44, which shall be corrected pursuant to Order of the Court." See Plaintiffs' Proposed Order.

II. ANY ATTEMPT TO TO AVOID REVIEW BASED UPON JURISDICTIONAL GROUNDS SHOULD BE DENIED.

In response to Plaintiffs' instant motion to Prohibit the Use of Uncertified Electronic Voting Systems in Rice County, the OSS submitted a Response and Declaration dated, filed, and served on October 13, 2022. Such filing was only 13 days prior to the October 26th hearing,

³ See October 16, 2022 Politico Article which calls out the security risks of modems used in Minnesota, "The modems, which send vote data from precincts to central offices using cellphone networks, help officials satisfy the public's demand for rapid results. But putting any networking connection on an election system opens up new ways to attack it that don't require physical access to machines, and security experts say the risks are not worth the rewards." Hagen Reply Aff. Exhibit Hagen 11 at _0093 through _0100.

⁴ See Statement of vulnerabilities for election systems using the unsupported Windows 7 Operating System. Hagen Reply Aff. Exhibits 12 and 13.

while the rules require such filing to be 14 days prior to the hearing. Minn. Gen. R. Prac. 115.06. Like Defendant Anderson submitting her September 29th dispositive motion one day late, the OSS offers no explanation for the late filing, nor requests leave of the court.

Should the Court accept such filings, the arguments presented attempting to avoid scrutiny of this important issue should be rejected by the Court. In fact, the Supreme Court analysis in the case Begin v. Richie is controlling in concluding that in fact there is sufficient jurisdictional reach under Minn. Stat. 204B.44 to hear this matter. 836 N.W.2d 545. In Begin, the court was hearing a Petition challenging the decertification of the Green Party as a minor political party. Id. at 546. The Court then clarifies that 204B.44 is not intended as a “broad vehicle through which any conduct with any relationship to an election, however tangential, can be challenged. Id. at 548. The OSS decertification in Begin was adjudicated as too “tangential” as it did not fit within the statutory language of “any duty concerning an election.” Id. Minn. Stat. 204B.44 confers broad discretion to cover, “any wrongful act, omission, or error” by an official regarding “any duty concerning an election.” (emphasis added). The “tangential” test set forth in Begin confirms that the duty of Anderson in “administering federal, state and local elections in Rice County”⁵ including the operation of the Electronic Voting Systems, is subject to review under 204B.44. Such outcome is affirmed by the case of Erlandson v. Kiffmeyer, where 204B.44’s “catch-all” provision was relied upon in obtaining jurisdiction over the administration of an election impacting multiple issues. 659 N.W.2d (Minn. 2003).

Next, despite the reality that this action is specific to Rice County and the duty of the Office of Defendant in her administration of Rice County elections, the OSS argues that only the Minnesota Supreme Court is authorized to hear this motion. As articulated above, 204B.44,

⁵ **Anderson Aff.** at paragraph 2.

subd. 4 is a catch all provision that relates to “any wrongful act” regarding “any duty concerning an election.” In that same statute, there are three preceding specific subdivisions relating to ballots and certificates of nomination. Id. at subd. (a) (1) (2) and (3). Clearly, the distinction in subd. (b) is a road map for determining where such ballot and certificate of nomination disputes are to be venued. The practicality of this distinction was highlighted in the case Lundquist v. Leonard, 652 N.W.2d 33 (Minn. 2002). The test for subds. (1) (2) and (3) ballot disputes is triggered on the “nature of the office” Id. at 36. If the ballot dispute is for state or federal, then the Minnesota Supreme Court is the most efficient venue. If the ballot dispute is for county, municipal or school district races, then the District Court is the most efficient venue. In the instant case, there is no ballot dispute and therefore no venue road map requirement. As confirmed in the case of League of Women Voters Minn. v. Richie, the scope of reach of 204B.44 should be interpreted broadly. 819 N.W.2d 636 (Minn. 2012).

Moreover, in the case Minn. Voters Alliance. v. Simon, the Minnesota Supreme Court articulated a detailed analysis as to why, in certain circumstances, the original jurisdiction of the district court is actually preferred, “even when a statute confers original jurisdiction” to the Supreme Court. 885 N.W.2d 885, 666 (Minn. 2016). As specifically stated, “The original jurisdiction that section 204B.44 (a)(4) confers on our court does not deprive the district court of its original jurisdiction to address a dispute that challenges election procedures generally.” Id. In that case, the Supreme Court refused jurisdiction in a 204B.44 case specifically because the district court was “better suited” to receive evidence and to have subsequent appellate review. Id. at 667. A more precise application of this issue cannot be found. ⁶

⁶ A review of this Supreme Court opinion discloses that the attorney for Secretary of State Steve Simon was the same Nathan J. Hartshorn that is now arguing for an outcome different than when the Supreme Court ruled in his favor.

Further, as argued in Plaintiffs' Memorandum of Law in Opposition to Defendant Motion to Dismiss Count III, the argument that all parties on the ballot are required to be served as parties to this action falls short. Neither Defendant Anderson, nor the OSS have presented a single case or authority that such service is required. In contrast, there are multiple published cases where the OSS has not imposed such a requirement, See League of Women Voters Minn. v. Ritchie, 819 N.W.2d 636 (Minn. 2012); Begin v. Ritchie, 836 N.W.2d 545 (Minn. 2013). Likewise, if the Court determines that additional parties to this action are required, Minn. Stat. 204B.44 provides such a mechanism authorizing service, "on any other party as required by the court." The parties necessary to argue and determine this dispute are present and had more than adequate opportunity to reply.

Finally, the matter of laches continues to be asserted by both Defendant Anderson and the OSS. Such a request for equitable relief is not justified on the facts presented and ignores the Minnesota Doctrine of "unclean hands" he who seeks equity, and he who comes into equity must come with clean hands." Hruska V. Chandler Associated, Inc., 372 N.W.2d 709 (Minn. 1985).

As further demonstration of the inequitable actions in this matter, on October 12, 2022, Defendant Anderson submitted by sworn affidavit a copy of the Rice County 2022 Electronic Voting Plan, which contained a five-page plan. See **Anderson Dec. 10/12/22**, Exhibit A. This was the same plan previously disclosed to Plaintiffs. See **Complaint** Exhibit B at _0019 through _0023. Out of the blue, On October 13, 2022, the OSS submits a sworn affidavit attaching a seven-page 2022 Electronic Voting Plan. See **Maeda Dec.10/13/22**, Exhibit D. These previously undisclosed two pages contained the important fact that both the DS200s with Modems and the DS450 with Modem relied upon version EVS 5.3.4.1, a fact central to this

entire case. Such a significant mid-briefing disclosure should put to rest any claim that Plaintiffs have not been diligent in obtaining the best information available and promptly pursuing this action.

CONCLUSION

For the reasons set forth above, Plaintiffs respectively request entry of an Order on Count III of the Plaintiffs' Complaint Prohibiting the use of any modem function in all Rice County Electronic Voting Systems, together with a requirement that Rice County obtain from the manufacturer (**ES&S**) a certification to this Court that all modem functions have been disabled or otherwise made inoperable.

PETERSON, KOLKER, HAEDT & BENDA, LTD.

Dated: October 19, 2022

By: /s/ Matthew L. Benda

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