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DEPUTY EXECUTIVE DIRECTOR

PAMELA GREEN PERKINS
ADMINISTRATIVE MANAGER

BOARD OF ELECTIONS

IN
THE CITY OF NEW YORK
EXECUTIVE OFFICE, 32 BROADWAY
NEW YORK, NY 10004-1609
(212) 487-5300
FAX (212) 487-5349
www.vote.nyc.ny.us

AGENDA COMMISSIONERS' MEETING TUESDAY, SEPTEMBER 8, 2009 AT 1:30 PM

-
1. Hearings
 - a) Hearings on Independent Nominating Petitions
 - b) Hearings on Designating Petitions
 2. Minutes
 - a) 07/14/09
 - b) 07/21/09
 - c) 07/28/09
 - d) 08/03/09
 - e) 08/11/09
 3. Marcus Cederqvist
 - a) HAVA Update
 4. John Ward
 - a) Comparative Expenditures

For Your Information

- E-mail re: August 28, 2009 HAVA Status Report
- HAVA Weekly Status Report, Week of 8/25/09 – 9/3/09
- E-mail re: Election Systems & Software, Inc. Announces the Acquisition of Premier Election Solutions from Diebold, Inc.
- Letter addressed to Todd Valentine and Stanley Zalen dated September 3, 2009
- Designation of Special Election Part – Litigation Relating to the Canvass and Recanvass of Votes Cast in the September 15, 2009 Primary Election – Citywide
- Supreme Court of the State of New York, County of Kings – Erlene J. King, Petitioner against The Board of Elections in the City of New York – 700035/09
- Designation of Special Election Part – Litigation Relating to the Canvass and Recanvass of Votes Cast in the September 15, 2009 Primary Election – Citywide

- Designation of Special Election Parts – Primary Day – September 15, 2009 in Queens, Bronx, Richmond and New York Counties
- Appellate Division, Supreme Court of the State of New York, Second Judicial Department – Decision and Order – William F. Mastro, J.P., John M. Leventhal, Cheryl E. Chambers and Sheri S. Roman, JJ. In the matter of Isaac Sasson, Petitioner-Respondent, et. al., Petitioner v Board of Elections in the City of New York, Respondent-Respondent, Constantine E. Kavadas, Appellant
- Supreme Court of the State of New York, County of Kings – Erlene J. King, Petitioner, against The Board of Election in the City of New York, Respondent
- Erlene J. King V. Board of Elections in the City of New York, Index No. 700035/2009
- Salim Ejaz V. Board of Elections in the City of New York, Index No. 112446/2009
- Jose Adames V. Board of Elections in the City of New York, Civil Action No. 7698
- Brother T. Williams Bey, Niyyirrah El, Lincoln Salmon, Juan Antonio Martinez, Sr., S. Juan Antonio Martinez, Jr., Sonya Simmons, Joyce Nix, et al. V. Board of Elections in the City of New York, Notice of Motion, 09 CV 7560 (DLC)
- Brother T. Williams Bey, Niyyirrah El, Lincoln Salmon, Juan Antonio Martinez, Sr., S. Juan Antonio Martinez, Jr., Sonya Simmons, Joyce Nix, et al. V. Board of Elections in the City of New York, Reply Memorandum, 09 CV 7560 (DLC)
- Brother T. Williams Bey, Niyyirrah El, Lincoln Salmon, Juan Antonio Martinez, Sr., S. Juan Antonio Martinez, Jr. V. Board of Elections in the City of New York, Affirmation of Brother T. Williams-Bey In Opposition to Defendant’s Motion to Dismiss, 09 CV 7560
- Anna R. Lewis V. Lydia Hummel and Board of Elections in the City of New York, Index No. 111509/2009
- Anna R. Lewis V. Lydia Hummel and Board of Elections in the City of New York, Index No. 111509/2009, Brief for Respondent

Marcus Cederqvist

From: TODD VALENTINE [TVALENTINE@elections.state.ny.us]
Sent: Friday, September 04, 2009 1:40 PM
To: Marcus Cederqvist; STAN ZALEN
Cc: George Gonzalez; Pamela Perkins
Subject: Re: FW: 8-28-09 Status Report



9-4-09 Status
Report.pdf (67 K...

Dear Marcus,

Thank you for bringing that to our attention. Unfortunatley it was an inadvertent error on our part. The testing is, in fact, still on scheduled for completion this fall and that this weeks report reflects that.

Again, thanks for your attention to detail and input.

Sincerely,

Todd Valentine

>>> "Marcus Cederqvist" <cede@boe.nyc.ny.us> 9/1/2009 4:25 PM >>>
Stanley & Todd:

We noticed in last week's report that it indicates that testing and certification of the new system is now listed as "in jeopardy and behind schedule." This is the first time that it was listed as such since the revised schedule was incorporated - could you advise us as to what happened to cause this change?

Thanks.

Marcus

-----Original Message-----

From: ROBBYANN MITOLA [mailto:RMITOLA@elections.state.ny.us]
Sent: Friday, August 28, 2009 12:15 PM
To: ANNA SVIZZERO; JOSEPH BURNS; JOHN CONKLIN; KIMBERLY GALVIN; PAUL COLLINS; ROBERT WARREN; STAN ZALEN; TODD VALENTINE
Subject: 8-28-09 Status Report

Attached is the weekly HAVA Compliance Update for the week ending August 28, 2009.

Have a wonderful weekend!

RobbyAnn



State of New York
STATE BOARD OF ELECTIONS

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Douglas A. Kellner
Chair
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Evelyn J. Aquila
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40 STEUBEN STREET
ALBANY, N.Y. 12207
Phone: 518/474-6367 Fax: 518/486-4546
website: www.elections.state.ny.us

Todd D. Valentine
Executive Director
Stanley L. Zalen
Executive Director
Kimberly A. Galvin
Special Counsel
Paul M. Collins
Deputy Counsel

September 4, 2009

Honorable Gary L. Sharpe
United States District Court
for the Northern District of New York
James T. Foley U.S. Courthouse
445 Broadway, Room 441
Albany, New York 12207

Re: *United States v. New York State Board of Elections, et al.*
Civil Action No. 06-CV-0263 (GLS)

Dear Judge Sharpe,

We enclose herewith Status Report of the Defendant New York State Board of Elections for the week ending September 3, 2009.

Respectfully submitted,

s/ _____
Kimberly A. Galvin (505011)
Special Counsel

s/ _____
Paul M. Collins (101384)
Deputy Special Counsel

NEW YORK STATE BOARD OF ELECTIONS

HAVA COMPLIANCE UPDATE
Activities & Progress for the Week of 8/25/09-9/3/09

Following is a detailed report concerning the previous week's progress in implementing the terms of the Court's Orders.

PLAN A

Overall Compliance Status Summary

Overall, activities and progress toward HAVA compliance are on schedule with the revised time line

Contracting with Voting System Vendors

Status of tasks in this category: on schedule

- OGS is working with Dominion and OSC to finalize the contract assignment from Sequoia.

Testing, Certification, and Selection of Voting Systems & Devices

Status of tasks in this category: on schedule with revised time line

- Overall progress of testing :
 - SysTest is on time for November 6th completion of Run for Record Testing.
 - The SysTest team is experiencing some testing delays with one of the vendor systems. Discussions are being had at every level in an effort to find ways to make up the time as the testing progresses.
 - Weekly conference calls with SBOE, Vendors and NYSTEC continue.

Delivery and Implementation of Voting Systems & Devices

Status of tasks in this category: on schedule

- Dominion is continuing Acceptance Testing. All of the counties are in possession of any machines needed to conduct the

NEW YORK STATE BOARD OF ELECTIONS

primary election. Dominion and SBOE will work with the counties to ensure that delivery of the additional units will be delivered at a convenient time for them.

HAVA COMPLAINT PROCESS

NYC HAVA Complaint

SBOE is continuing to review public comments on the proposed regulations. The Board meeting will be on September 10, 2009 at which a vote to adopt the regulation is anticipated.

Selina Williams

From: Marcus Cederqvist
Sent: Thursday, September 03, 2009 4:01 PM
To: *Commissioners
Cc: *ExecutiveManagement; Lucille Grimaldi; John Naudus; John P. O'Grady; Steven H. Richman; Gartner - Steve Monahan; Michael Kinara (external address); *ExecSupportGroup
Subject: FW: Election Systems & Software, Inc Announces the acquisition of Premier Election Solutions from Diebold, Inc.

For your information

—Original Message—

From: TODD VALENTINE [mailto:TVALENTINE@elections.state.ny.us]
Sent: Thursday, September 03, 2009 3:32 PM
Cc: ANNA SVIZZERO; JOSEPH BURNS; KIMBERLY GALVIN;
ROBERT BREHM; STAN ZALEN
Subject: Fwd: Election Systems & Software, Inc Announces the acquisition of Premier Election Solutions from Diebold, Inc.

Dear County Boards,

We recieved the e-mail below from ES and S stating that ES and S has acquired Premier. Currently we expect no change to the ES and S commitment to the State Board and the certification project. ES and S should be in touch with customers directly, but we are forwarding this e-mail as informational, and boards will find basic information in the questions and answers section which is contained in the e-mail.

Sincerely,

Todd Valentine
Co-Executive Director
NYS Board of Elections

>>> "Aldo Tesi ES&S" <aldo.tesi@essvote.com> 9/3/2009 10:06 AM >>>
September 3, 2009

Dear Todd:

Election Systems & Software, Inc. (ES&S) is pleased to announce the acquisition of Premier Election Solutions, Inc. (PES). Both companies are excited about the opportunity to unite our experienced management teams and associates to meet the needs of our customers more effectively. Together we will continue to focus on our core mission of "Maintaining Voter Confidence and Enhancing the Voting Experience."

We will combine the strengths of both organizations to benefit our customers, and are confident the result will be a better, more efficient and effective operating model. This model will serve our customers well and provide a sustainable delivery platform for the election industry.

Because of the important role we play in supporting elections, we recognize the responsibility we have to provide timely assistance to all of our customers. You have placed your trust and confidence in us and our products and services. Rest assured, we will demonstrate the same level of commitment to delivering high quality services and voting solutions you have come to expect. We understand it is more important than ever that we

meet and exceed our customer expectations during the upcoming elections.

Attached is a document which addresses key questions you may have regarding the acquisition. You will receive more information in the coming weeks. Should you have any additional questions or immediate needs, please do not hesitate to contact us.

We appreciate your business and your ongoing support of the work we do for you. We are excited about the future and look forward to enhancing our ability to meet the needs of all our customers.

Sincerely,

Aldo Tesi

President and CEO

Election Systems & Software, Inc.

Key Questions and Answers

Why did this acquisition take place?

ES&S and PES strongly believe the combination of these two experienced companies will allow us to serve jurisdictions more effectively by providing high quality voting solutions and services. We will combine the strengths of both organizations to benefit all of our customers.

This combination will allow us to continue to innovate and create new voting systems, software and services that meet our customers' evolving election needs.

Will there be any immediate staffing changes?

ES&S and PES are committed to work closely with you as we combine the strengths of both organizations. We are committed to a smooth transition with no interruptions to the level of service and support for your upcoming elections. We promise to proactively communicate to you as changes occur. One thing will never change: our commitment to supporting customers' election needs and requirements. Any upcoming elections will be supported in the manner our customers have come to expect from our two companies.

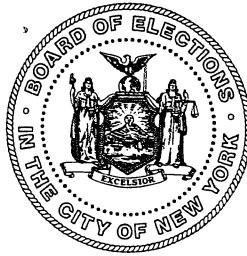
Who do I contact for questions or assistance?

Unless and until you are advised differently, please continue to contact the same individuals you have in the past at the phone numbers and locations to which you are accustomed. Also, please continue to use the same email for on-line correspondence and current addresses for mailing any documents. As changes in phone numbers, emails and addresses occur, you will receive a notice in advance of the changes to ensure you always have full access to our staff.

Who do I contact for any election related needs or questions?

Please continue to contact the same individuals you have in the past.

Both *ES&S* and *PES* are committed to providing you with a high level of responsiveness for your upcoming elections.



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ADMINISTRATIVE MANAGER

September 3, 2009

Mr. Todd Valentine
Co-Executive Director
New York State Board of Elections
40 Steuben Street
Albany, NY 12207-2108

Mr. Stanley Zalen
Co-Executive Director
New York State Board of Elections
40 Steuben Street
Albany, NY 12207-2108

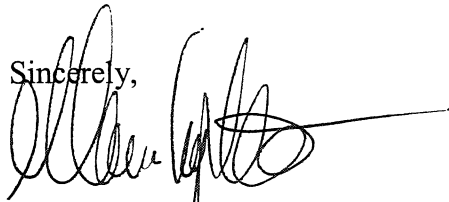
Dear Mr. Valentine and Mr. Zalen:

At the direction of the Commissioners of Elections in the City of New York, I am writing to inquire about the status of our request for an electronic copy of the voter files for deaths, felons, and duplicates in New York City.

As you know, the Board of Elections in the City of New York requested this file early this year so that it could mail Notice of Intent to Cancel letters to the records contained in the list. Your office mailed questions concerning the request to Steven Ferguson, our Director of Management Information Systems, and Steve sent a reply with the requested information on May 19, 2008. We have not received any information concerning the request since that time. I have taken the liberty of enclosing both letters for your review and ask that you look into the matter as soon as possible.

Thank you for your kind assistance with matter. Please do not hesitate to contact me if you have any questions or if I can be of any assistance.

With best wishes.

Sincerely,

Marcus Cedergvist
Executive Director

Encl.

Cc: Commissioners of Election in the City of New York
George González, Deputy Executive Director
Pamela Perkins, Administrative Manager
Steven Ferguson, Director, Management Information Systems
Steven H. Richman, General Counsel



James A. Walsh
Co-Chair

Gregory P. Peterson
Commissioner

Todd D. Valentine
Co-Executive Director

40 STEUBEN STREET
ALBANY, N.Y. 12207-2108

Phone: 518/474-6220

www.elections.state.ny.us

George E. Stanton, Chief Information Officer

Douglas A. Kellner
Co-Chair

Evelyn J. Aquila
Commissioner

Stanley L. Zalen
Co-Executive Director

Steve Ferguson
New York City Board of Elections
32 Broadway
New York, NY 10004-1609

Dear Steve,

I have discussed with the NYSVoter Steering Committee the request by the City Board that the State Board provide *'on an interim basis'* files for potential deaths, felons and duplicates, pending NYCBOE's full use, on a real time basis, of NYSVoter in accordance with both state and federal law. In order to consider this interim request, we would like clarification on the following questions:

1. How frequently will you want to receive and process the files?
2. What will be your procedures processing each type of file?
3. How will the updates be made to your system and subsequently submitted to NYSVoter?
4. How will you address the voters who show up in the potential duplicate list that should be marked as "not duplicate" in NYSVoter?
5. What is the estimated time period that you intend to use this interim process in lieu of full statutory compliance?

If you can answer those questions for me, I will bring them back to the committee and hopefully we can resolve these file maintenance issues.

Sincerely,

A handwritten signature in cursive script that reads "George E. Stanton".

George E. Stanton



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ADMINISTRATIVE MANAGER

STEVEN FERGUSON
Director of
Management Information
Systems

May 19, 2008

Mr. George E. Stanton, CIO
New York State Board of Elections
40 Steuben Street
Albany, New York 12207-2108

Dear George:

This is in reply to your letter sent to me via e-mail on February 27, 2009. Here are some clarifications that I am able to provide you.

Item 1. Depending on the schedule you receive your information from the respective agencies, our plan would be to receive and process on a monthly basis.

Item 2. The lists will be sent to each borough who will use the procedures set forth in the Election Law and the BOE in NYC's duly established administrative procedures, to process these files.

Item 3. Updates will be made in our own AVID system and work their way to NYSVoter just as any change is made currently.

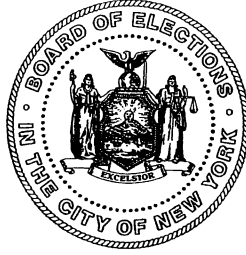
Item 4. This issue cannot be resolved on our side with the proposed interim process.

Item 5. Until such time as the Statewide Voter Registration list operates in a manner consistent with the State's constitutional and statutory requirements.

Hopefully, this will clarify some of your questions.

Sincerely,

Steve Ferguson
Director of MIS



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STEVEN H. RICHMAN
GENERAL COUNSEL
Tel: (212) 487-5338
Fax: (212) 487-5342
E-Mail:
srichman@boe.nyc.ny.us

VIA U.S. POSTAL SERVICE EXPRESS MAIL

NOTICE OF HEARING

September 3, 2009

**TO: Shelia E. Peralta, Candidate for Delegate to the Republican
Judicial Convention for the 11th Judicial District From The 25th
Assembly District, Queens County; 32-15 163rd Street, Queens,
NY 11358**

EM376945128US

**John F. Haggerty, Jr., First Named Person on Committee to Fill
Vacancies for Petition ID # QN-09-00688; 115 Greenway North,
Queens, NY 11375**

EM376945131US

**Phillip Ragusa, First Named Person on Committee to Fill
Vacancies for Petition ID # QN-09-00444, QN-09-00445, QN-09-
00471; 14-15- 157th Street, Queens, NY 11357**

EM376945635US

Pursuant to the provisions of the Designating Petition Rules for the
September 15, 2009 Primary Election, particularly, Rule J6 and Parts C, D

and E, **NOTICE** is hereby given that the Executive Committee of

the Commissioners of Elections in the City of New York (comprised of the President and Secretary of the Board for calendar year 2009) have

scheduled a **HEARING** to consider the candidacy of Shelia E. Peralta as a Candidate for Delegate to the Republican Judicial Convention for the 11th Judicial District from the 25th Assembly District, Queens County in the September 15, 2009 Republican Party Primary, based on the circumstances described below for:

TUESDAY, SEPTEMBER 8, 2009 at 1:30 PM

**Commissioners' Hearing Room,
42 Broadway, 6th Floor, New York, NY 10004.**

BACKGROUND:

The staff of the Candidate Records Unit, in preparing the ballots for the September 15, 2009 Primary Election found the following facts:

On July 13, 2009, three(3) petition volumes with Petition Identification Numbers QN-09-00444, QN-09-00445, and QN-09-00471 were filed with the Board designating Ms. Peralta for the position of Candidate for Delegate to the Republican Judicial Convention for the 11th Judicial District from the 25th Assembly District, Queens County in the September 15, 2009 Republican Party Primary. Said petitions also established a Committee to Fill Vacancies, of which Mr. Ragusa is the first named member. No cover sheet was filed on behalf of the candidate claiming the above-referenced petitions. To date, the Board has not issued a notice of non-compliance in accordance with Parts C and D of the designating petition rules. Under the Election Law, the candidate would have three days to cure this defect upon the issuance of notice by the Board.

On July 16, 2000, one (1) petition volume with Petition Identification Number QN-09-00688 was filed with the Board designating Ms. Peralta for the position of Candidate for Delegate to the Republican Judicial Convention for the 11th Judicial District from the 25th Assembly District, Queens County in the September 15, 2009 Republican Party Primary. Said petition also established a Committee to Fill Vacancies, of which

Mr. Haggerty as the first named member. A cover sheet was filed on behalf of the candidate claiming the above-referenced petition on July 16, 2009, with Mr. Haggerty as the contact person to correct deficiencies.

In addition, each of the foregoing sets of petitions designated another person as a Candidate for Delegate to the Republican Judicial Convention for the 11th Judicial District from the 25th Assembly District, Queens County in the September 15, 2009 Republican Party Primary (Stephen Graves on the volumes filed on July 13 and Howard T. Duffy on the volume filed on July 16). Valid Cover Sheets for each of those candidates have been filed with the Board.

The Queens County Republican County Committee's Party Call establishes that **two delegates** to the judicial convention are to be elected from the 25th Assembly District.

ISSUES TO BE DETERMINED:

The issues that the Board seeks to determine at the hearing are:

- (1) For which petition volumes did Ms. Peralta consent to appear on?
- (2) If Ms. Peralta consented to appear on all petition volumes, does that constitute an over designation, which is a Prima Facie defect and therefore should she be removed from the Primary Ballot?
- (3) With which other candidate does Ms. Peralta seek to appear as a group on the Primary Ballot?
- (4) If Ms. Peralta seeks to appear with Stephen Graves, does she want the opportunity to file an amended cover sheet to cure the defect and claim Petition ID Numbers QN-09-00444, QN-09-00445, and QN-09-00471?

PROCEDURES:

The Executive Committee of the Commissioners of Elections in the City of New York in a telephone conference held on September 2, 2009 directed that this Notice be sent to each of you via Express Mail.

Please be advised that you may appear at said Hearing either in person or by Counsel/Authorized Representative in accordance with the provisions of Rule J of the Board's Designating Petition Rules for the September 15, 2009 Primary Election. In addition, if you have information or evidence to assist the Board in resolve these issues you may submit it to the Board, prior to the hearing date set forth above or at the hearing. If you wish to submit it to the Board, you should file it by delivering the evidence/ information in person at the Board's Executive Offices, 32 Broadway, 7th Floor, Borough of Manhattan, New York between the hours of 9 AM and 5 PM, Monday through Fridays (except legal holidays).

**This Notice of Hearing is issued by direction of
The Executive Committee of the
Commissioners of Elections in the City of New York:**

By: 
Steven H. Richman, General Counsel

Copy: Commissioners of Elections in the City of New York
Marcus Cederqvist, Executive Director
George Gonzalez, Deputy Executive Director
Pamela Perkins, Administrative Manager
John Owens, Esq., Director, Campaign Financing Reporting
Enforcement
Troy Johnson, Coordinator, Candidate Records Unit
Steven Denkberg, Esq., Counsel to the Commissioners
Charles Webb, Esq., Counsel to the Commissioners
Diana Scopelliti, Esq., Temporary Staff Attorney
Christopher Manos, Esq., Temporary Staff Attorney



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ADMINISTRATIVE MANAGER

JOHN J. WARD
FINANCE OFFICER

DATE: September 08, 2009
TO: Commissioners

FROM: John J. Ward
Finance Officer

RE: Comparative Expenditures

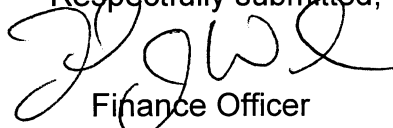
FY10	P.S. Projection through 9/04/09 Payroll:	\$ 3,436,500
FY10	P.S. Actual through 9/04/09 Payroll:	<u>\$ 4,333,563</u>
	Difference	(\$ 897,063)

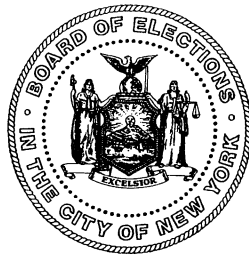
Overtime pays two weeks ending 8/21/09

OVERTIME USAGE

General Office	81,890
Brooklyn	66,905
Queens	52,611
Bronx	51,737
New York	64,764
Staten Island	<u>6,631</u>
Total	\$324,538

Respectfully submitted,


Finance Officer



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ADMINISTRATIVE MANAGER

STEVEN H. RICHMAN
GENERAL COUNSEL
Tel: (212) 487-5338
Fax: (212) 487-5342
E-Mail:
srichman@boe.nyc.ny.us

September 2, 2009

TO: Chief Clerk and Deputy Chief Clerk – BROOKLYN

FROM: Steven H. Richman, General Counsel 

COPIES: The Commissioners of Elections, Marcus Cederqvist, George Gonzalez, Pamela Perkins, Steven Denkberg, Charles Webb, Rosanna Rahmouni, Christopher Matos, Dianna Scopelliti;

Stephen Kitzinger, Esq., New York City Law Department
Lester Paverman, Esq., New York City Police Department

RE: **DESIGNATION OF SPECIAL ELECTION PART –
LITIGATION RELATING TO THE CANVASS AND
RECANVASS OF VOTES CAST IN THE SEPTEMBER 15,
2009 PRIMARY ELECTION - CITYWIDE**

Attached hereto for your information and appropriate action is a copy of Administrative Transfer Order (ATO) 81 issued on August 31, 2009, by the Hon. Fern A. Fisher, Deputy Chief Administrative Judge of the Unified Court System for New York Courts establishing a Special Election Term for all post primary applications requesting impoundment or stopping the vote count for any ballot cast in the September 15, 2009 Primary anywhere within the City of New York. This assignment is effective September 15, 2009 and shall remain in effect until September 29, 2009 (the date of the runoff primary election).

Justice Fisher has designated the HON. MARCIA P. HIRSCH, a Judge of the Court of Claims (and Acting Supreme Court Justice pursuant to Chapter 906 of the Laws of 1996) assigned to the Criminal Term of New York State Supreme Court, 11th Judicial District, Queens County.

Please post a copy of ATO 81 at your front counters at your offices and at the entrance to each VMF.

Thank you for your cooperation in this matter. If you have any questions, please call me.

Attachment



STATE OF NEW YORK
UNIFIED COURT SYSTEM
111 CENTRE STREET
NEW YORK, NEW YORK 10013
646-386-4200

ANN PFAU
CHIEF ADMINISTRATIVE JUDGE

FERN A. FISHER
DEPUTY CHIEF ADMINISTRATIVE JUDGE
NEW YORK CITY COURTS

ADMINISTRATIVE TRANSFER ORDER 81

Pursuant to the authority vested in me, I hereby temporarily designate a Special Term for all post primary applications requesting impoundment or stopping the vote count for any ballot in the Primary Election of September 15, 2009 and do assign the following Supreme Court Justice to hold such term, in addition to her other assignments:

HON. MARCIA P. HIRSCH
Supreme Court, Eleventh Judicial District
125-01 Queens Boulevard
Kew Gardens, New York 11412

This assignment shall become effective September 15, 2009 and shall remain in effect until September 29, 2009.

Dated: New York, New York
August 31, 2009

FERN A. FISHER
Deputy Chief Administrative Judge
New York City Courts

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GENERAL COUNSEL
BD. OF ELECTIONS
IN THE CITY OF NEW YORK
2009 SEP - 1 PM 4: 38

Comm mtg
FYI

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----x 700035/09

In the Matter of the Application

ERLENE J. KING,

REPLY

Petitioner,

-against-

THE BOARD OF ELECTIONS IN THE CITY OF
NEW YORK,

Respondent.

-----x

HECTOR A. NOVELL, Esq. an attorney duly admitted to practice before the Courts of
the State of New York affirms the following upon the penalties of perjury.

1. I am Of Counsel to Figeroux & Associates attorneys of record for
Petitioner, ERLENE J. KING and as such I am familiar with all the facts
and circumstances had herein.

2. I submit this Reply in support of my instant application for what petitioner
ERLENE J. KING describes as "a fair, unbiased and freely contested
election process."

2009 SEP -1 PM 12:38
 RECEIVED
 GENERAL COUNSEL
 BO. OF ELECTIONS
 IN THE CITY OF NEW YORK

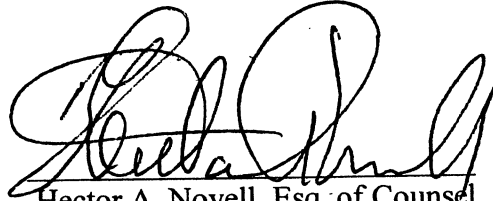
3. A review of the action/position taken by Respondent will demonstrate Respondent bona fides and place petitioner ERLENE J. KING's sentiments in proper perspective.
4. According to the Affirmation of Elizabeth A. Wells in Opposition in paragraphs 8 & 9, "Pursuant to New York Election Law, the Commissioners of Elections in the City of New York, voted to print absentee ballots on August 5, 2009, well before the Court's Order of August 13, 2009. See NY Elec § 4-114; Richman Affirmation at #3." and "By that vote, the Board determined which candidates were duly designated or nominated to be placed on the absentee ballot for the September 15, 2009 primaries. Richman Affirmation at #4."
5. It is respectfully pointed out to this Court that on August 5, 2009, the Board also voted to remove petitioner, ERLENE J. KING from the ballot. At that point, Petitioner, ERLENE J. KING was entitled to (3) three business days to cure the Board's newly created and therefore hand written deficiency. A copy of said letter is annexed at Exhibit #1.
6. Why the haste, your honor? The board must have been aware of the existence of the JUMANEE D. WILLIAMS Petition to Invalidate petitioner ERLENE J. KING's designating petition. If the Board was not aware of above mentioned petition, they certainly must have been aware of her right to cure. The Board took a vote without regard to petitioner ERLENE J. KING rights even though NY Election Law § 4-14 provide

that the Board may act “not later than the thirty-fifth day before the day of a primary or general election.”

7. The Affirmation in Opposition in paragraphs 10 and 11 contends that “this determination of the Board (of which candidates were duly designated or nominated to be placed on the absentee ballot) is final and conclusive. NY Election Law § 7-122(4).” and “while a Board of Elections or a court of competent jurisdiction **may determine after “this final and conclusive” determination that a candidate was improperly place on an absentee ballot,** “ . See *id.*
8. The Affirmation in Opposition contention in paragraph 10 is correct. However, paragraph 11 does not correctly reflect the provisions of NY Election Law § 7-1 22 (4) which provides “.... but nothing herein contained shall prevent a Board of Elections or a court of competent jurisdiction from **determining at a later date that any such certification, designation or nomination is invalid** and in the event of such later determination vote cast for any such nominee by any voter shall be counted at the election.”

Pursuant to the foregoing, the Court’s powers are broader than claimed by Respondent. In order to be just, this Court may invalidate the Board’s certification of August 5, 2009.

WHEREFORE petitioner requests that the instant application be granted in its entirety or that the Boards certification of August 5, 2009 be invalidated.

A handwritten signature in black ink, appearing to read 'Hector A. Novell', written over a horizontal line.

Hector A. Novell, Esq. of Counsel
FIGEROUX & ASSOCIATES
26 Court Street, Suite 701,
Brooklyn, NY 11242
(718)834-0190

Dated: September 1, 2009
Brooklyn, New York

EXHIBIT #1



FREDERIC M. UMANE
PRESIDENT

JULIE DENT
SECRETARY

JOSE MIGUEL ARAUJO
JUAN CARLOS "J.C." POLANCO
JAMES J. SAMPEL
NANCY MOTTOLA-SCHACHER
NAOMI C. SILIE
J.P. SIPP
GREGORY C. SOUMAS
JUDITH D. STUPP
COMMISSIONERS

BOARD OF ELECTIONS

IN
THE CITY OF NEW YORK
EXECUTIVE OFFICE, 32 BROADWAY
NEW YORK, NY 10004-1609
(212) 487-5300
www.vote.nyc.ny.us

MARCUS CEDERQVIST
EXECUTIVE DIRECTOR

GEORGE GONZALEZ
DEPUTY EXECUTIVE DIRECTOR

PAMELA GREEN PERKINS
ADMINISTRATIVE MANAGER

STEVEN H. RICHMAN
GENERAL COUNSEL
Tel: (212) 487-5338
Fax: (212) 487-5342

E-Mail:
srichman@boe.nyc.ny.us

EM376944330US

July 30, 2009

Neil Albert
(Candidate/Contact Person)

Candidate's Name: Erlene R. J. King
Party: Democratic
Office: NYC Council
District: 45TH

Dear Sir/Madam:

Please be advised that your cover sheet fails to comply with the New York State Board of Elections Regulations, 9NYCRR §6215, or this Board's Rules for Designating/Opportunity to Ballot Petitions adopted on March 24, 2009, for the following reason(s):

(one summary cover sheet not)

- X 1. No cover sheet filed. *filed.*
- ~ 2. Cover sheet attached to petition.
- ~ 3. Name of Party omitted from cover sheet.
- ~ 4. Number of volumes omitted from cover sheet.
- ~ 5. Number of volumes claimed doesn't agree with claimed identification numbers on cover sheet.
- ~ 6. No identification number(s) claimed on cover sheet.
- ~ 7. Incorrect identification number(s) on cover sheet.
- ~ 8. Cover sheet omits statement claiming valid signatures in petition.
- ~ 9. Candidate name omitted from cover sheet.
- ~ 10. Candidate address omitted from cover sheet.
- ~ 11. Office and/or district omitted from cover sheet.

- ~ 12. Amended cover sheet is not certified.
- ~ 13. County committee schedule omitted.
- ~ 14. County committee schedule does not conform to regulations.
- ~ 15. Some candidates for county committee have no page numbers on the schedule. Those candidates are removed unless the defect is cured.
- 16. Other:

This defect may be cured within three business days of the date of this letter by the filing of an amended cover sheet. Amended cover sheets must be **filed in person only** at the Executive Office, 32 Broadway, 7th Floor, Borough of Manhattan, New York.

Failure to file the amended cover sheet within the three day period shall be a **FATAL DEFECT**.

Very Truly Yours,

THE COMMISSIONERS OF ELECTIONS
IN THE CITY OF NEW YORK

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS**

-----X Index No. 700035/09

In the Matter of the Application,

ERLENE J. KING,

Petitioner,

-against-

**THE BOARD OF ELECTIONS IN THE CITY
OF NEW YORK,**

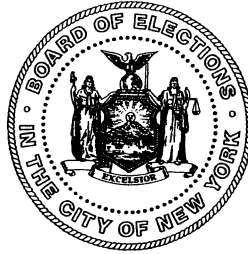
Respondent.

-----X

REPLY

**HECTOR A. NOVELL, ESQ. OF COUNSEL
FIGEROUX & ASSOCIATES
Attorneys For Petitioner
26 Court Street, Suite 701
Brooklyn, NY 11201
Tel: 718-834-0190
Fax: 718-222-3153**

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GENERAL COUNSEL
BO. OF ELECTIONS
IN THE CITY OF NEW YORK



FREDERIC M. UMANE
PRESIDENT

JULIE DENT
SECRETARY

JOSE MIGUEL ARAUJO
JUAN CARLOS "J.C." POLANCO
JAMES J. SAMPEL
NANCY MOTTOLA-SCHACHER
NAOMI C. SILIE
J.P. SIPP
GREGORY C. SOUMAS
JUDITH D. STUPP
COMMISSIONERS

BOARD OF ELECTIONS

IN
THE CITY OF NEW YORK
EXECUTIVE OFFICE, 32 BROADWAY
NEW YORK, NY 10004-16015
(212) 487-5300
www.vote.nyc.ny.us

MARCUS CEDERQVIST
EXECUTIVE DIRECTOR

GEORGE GONZALEZ
DEPUTY EXECUTIVE DIRECTOR

PAMELA GREEN PERKINS
ADMINISTRATIVE MANAGER

STEVEN H. RICHMAN
GENERAL COUNSEL
Tel: (212) 487-5338
Fax: (212) 487-5342
E-Mail:
srichman@boe.nyc.ny.us

September 2, 2009

TO: ✓ The Commissioners of Elections

FROM: Steven H. Richman, General Counsel 

COPIES: Marcus Cederqvist, George Gonzalez, Pamela Perkins, Steven Denkberg, Charles Webb, Rosanna Rahmouni, Christopher Matos, Dianna Scopelliti;
Chief Clerk and Deputy Chief Clerk – QUEENS
Deputy Chief Clerks - BRONX
Chief Clerk and Deputy Chief Clerk – STATEN ISLAND
Chief Clerk and Deputy Chief Clerk – MANHATTAN

Stephen Kitzinger, Esq., New York City Law Department
Lester Paverman, Esq., New York City Police Department

RE: **DESIGNATION OF SPECIAL ELECTION PART –
LITIGATION RELATING TO THE CANVASS AND
RECANVASS OF VOTES CAST IN THE SEPTEMBER 15,
2009 PRIMARY ELECTION - CITYWIDE**

Attached hereto for your information and appropriate action is a copy of Administrative Transfer Order (ATO) 81 issued on August 31, 2009, by the Hon. Fern A. Fisher, Deputy Chief Administrative Judge of the Unified Court System for New York Courts establishing a Special Election Term for all post primary applications requesting impoundment or stopping the vote count for any ballot cast in the September 15, 2009 Primary anywhere

within the City of New York. This assignment is effective September 15, 2009 and shall remain in effect until September 29, 2009 (the date of the runoff primary election).

Justice Fisher has designated the HON. MARCIA P. HIRSCH, a Judge of the Court of Claims (and Acting Supreme Court Justice pursuant to Chapter 906 of the Laws of 1996) assigned to the Criminal Term of New York State Supreme Court, 11th Judicial District, Queens County.

Note to Chiefs and Deputies: Please post a copy of ATO 81 at your front counters at your offices and at the entrance to each VMF.

Thank you for your cooperation in this matter. If you have any questions, please call me.

Attachment



STATE OF NEW YORK
UNIFIED COURT SYSTEM
111 CENTRE STREET
NEW YORK, NEW YORK 10013
646-386-4200

ANN PFAU
CHIEF ADMINISTRATIVE JUDGE

FERN A. FISHER
DEPUTY CHIEF ADMINISTRATIVE JUDGE
NEW YORK CITY COURTS

ADMINISTRATIVE TRANSFER ORDER 81

Pursuant to the authority vested in me, I hereby temporarily designate a Special Term for all post primary applications requesting impoundment or stopping the vote count for any ballot in the Primary Election of September 15, 2009 and do assign the following Supreme Court Justice to hold such term, in addition to her other assignments:

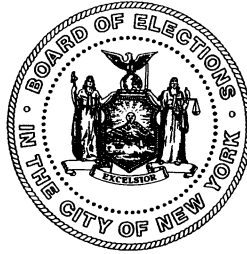
HON. MARCIA P. HIRSCH
Supreme Court, Eleventh Judicial District
125-01 Queens Boulevard
Kew Gardens, New York 11412

This assignment shall become effective September 15, 2009 and shall remain in effect until September 29, 2009.

Dated: New York, New York
August 31, 2009

FERN A. FISHER
Deputy Chief Administrative Judge
New York City Courts

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GENERAL COUNSEL
BD. OF ELECTIONS
IN THE CITY OF NEW YORK
2009 SEP - 1 PM 4: 38



FREDERIC M. UMANE
PRESIDENT

JULIE DENT
SECRETARY

JOSE MIGUEL ARAUJO
JUAN CARLOS "J.C." POLANCO
JAMES J. SAMPEL
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PAMELA GREEN PERKINS
ADMINISTRATIVE MANAGER

STEVEN H. RICHMAN
GENERAL COUNSEL
Tel: (212) 487-5338
Fax: (212) 487-5342
E-Mail:
srichman@boe.nyc.ny.us

September 2, 2009

TO: ✓ The Commissioners of Elections

FROM: Steven H. Richman, General Counsel 

COPIES: Marcus Cederqvist, George Gonzalez, Pamela Perkins, Steven Denkberg, Charles Webb, Rosanna Rahmouni, Christopher Matos, Dianna Scopelliti;
Chief Clerk and Deputy Chief Clerk – QUEENS
Deputy Chief Clerks - BRONX
Chief Clerk and Deputy Chief Clerk – STATEN ISLAND
Chief Clerk and Deputy Chief Clerk – MANHATTAN

Stephen Kitzinger, Esq., New York City Law Department
Lester Paverman, Esq., New York City Police Department

RE: **DESIGNATION OF SPECIAL ELECTION PARTS –
PRIMARY DAY – SEPTEMBER 15, 2009 in
QUEENS, BRONX RICHMOND AND NEW YORK COUNTIES**

Attached hereto for your information and appropriate action are copies of Administrative Transfer Orders (ATO) issued on August 31, 2009, by the Hon. Fern A. Fisher, Deputy Chief Administrative Judge of the Unified Court System for New York Courts establishing Special Election Parts for Primary Day:

ATO 77 establishes a Special Term for Election Matters in the Supreme Court, Civil Branch, QUEENS County, Eleventh Judicial District for the Primary Election to be held on Tuesday, September 15, 2009.

ATO 78 establishes a Special Term for Election Matters in the Supreme Court, Civil Branch, BRONX County, Twelfth Judicial District for the Primary Election to be held on Tuesday, September 15, 2009.

ATO 79 establishes a Special Term for Election Matters in the Supreme Court, Civil Branch, RICHMOND County, and Thirteenth Judicial District for the Primary Election to be held on Tuesday, September 15, 2009.

ATO 80 establishes two Special Terms for Election Matters in the Supreme Court, Civil Branch, NEW YORK County, First Judicial District for the Primary Election to be held on Tuesday, September 15, 2009. One Special Election Term will sit at the Board's Borough Office. The other will sit at the Harlem State Office Building.

Each of the above-referenced Special Election Terms will sit at the Board's respective Borough Office (with an additional site in Manhattan as set forth above). Please make the appropriate arrangements to accommodate the Justices of the Supreme Court and their support personnel.

Note to the Chief and Deputy: If the assigned Justice does not appear at the scheduled time, please contact my office immediately so that appropriate notifications to the Deputy Chief Administrative Judge's office can be made and the situation addressed forthwith.

Thank you for your cooperation in this matter. If you have any questions, please call me.

Attachments



STATE OF NEW YORK
UNIFIED COURT SYSTEM
111 CENTRE STREET
NEW YORK, NEW YORK 10013
646-386-4200

ANN PFAU
CHIEF ADMINISTRATIVE JUDGE

FERN A. FISHER
DEPUTY CHIEF ADMINISTRATIVE JUDGE
NEW YORK CITY COURTS

ADMINISTRATIVE TRANSFER ORDER 77

Pursuant to the authority vested in me, I hereby temporarily designate a Special Term, of the Supreme Court, Civil Branch, Queens County, for the Primary Election, to be held on Tuesday, September 15, 2009, to hear and determine all cases arising under the Election Law relating to eligibility for voting, and do assign the following Supreme Court Justices to hold such Special Term for Election Matters, in addition to their other assignments.

QUEENS COUNTY
Board of Elections
126-06 Queens Blvd., Kew Gardens, New York 11475

7:00 A.M. to 2:00 P.M.

HON. FERNANDO M. CAMACHO

2:00 P.M. to 9:00 P.M.

HON. WILLIAM HARRINGTON

Dated: New York, New York
August 31, 2009

FERN A. FISHER
Deputy Chief Administrative Judge
New York City Courts

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646-386-4200

ANN PFAU
CHIEF ADMINISTRATIVE JUDGE

FERN A. FISHER
DEPUTY CHIEF ADMINISTRATIVE JUDGE
NEW YORK CITY COURTS

ADMINISTRATIVE TRANSFER ORDER 78

Pursuant to the authority vested in me, I hereby temporarily designate a Special Term, of the Supreme Court, Civil Branch, Bronx County, Twelfth Judicial District, for the Primary Election to be held on Tuesday, September 15, 2009, to hear and determine all cases arising under the Election Law relating to eligibility for voting, and do assign the following Supreme Court Justices to hold such Special Term for Election Matters, in addition to their other assignments.

BRONX COUNTY
Board of Elections
1780 Grand Concourse, Bronx, New York 10457

7:00 A.M. to 2:00 P.M.

HON. YVONNE GONZALEZ

2:00 P.M. to 9:00 P.M.

HON. WILMA GUZMAN

Dated: New York, New York
August 31, 2009

FERN A. FISHER
Deputy Chief Administrative Judge
New York City Courts

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ANN PFAU
CHIEF ADMINISTRATIVE JUDGE

FERN A. FISHER
DEPUTY CHIEF ADMINISTRATIVE JUDGE
NEW YORK CITY COURTS

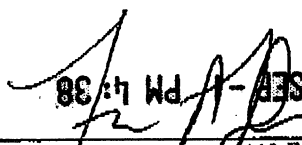
ADMINISTRATIVE TRANSFER ORDER 79

Pursuant to the authority vested in me, I hereby temporarily designate a Special Term, of the Supreme Court, Civil Branch, Richmond County, Thirteenth Judicial District, for the Primary Election to be held on Tuesday, September 15, 2009, to hear and determine all cases arising under the Election Law relating to eligibility for voting, and do assign the following Supreme Court Justices to hold such Special Term for Election Matters, in addition to their other assignments.

RICHMOND COUNTY
Board of Elections
One Edgewater Plaza, Staten Island, New York 10305

6:00 A.M. to 9:00 A.M.	HON. ROBERT J. COLLINI
9:00 A.M. to 1:00 P.M.	HON. ANTHONY I. GIACOBBE
1:00 P.M. to 6:00 P.M.	HON. JOSEPH J. MALTESE
6:00 P.M. to 9:00 P.M.	HON. BARBARA I. PANEPINTO

Dated: New York, New York
August 31, 2009


 2009 SEP 1 - PM 4:38
 FERN A. FISHER
 Deputy Chief Administrative Judge
 New York City Courts



STATE OF NEW YORK
UNIFIED COURT SYSTEM
111 CENTRE STREET
NEW YORK, NEW YORK 10013
646-386-4200

ANN PFAU
CHIEF ADMINISTRATIVE JUDGE

FERN A. FISHER
DEPUTY CHIEF ADMINISTRATIVE JUDGE
NEW YORK CITY COURTS

ADMINISTRATIVE TRANSFER ORDER 80

Pursuant to the authority vested in me, I hereby temporarily designate a Special Term, of the Supreme Court, Civil Branch, New York County, First Judicial District, for the Primary Election to be held on Tuesday, September 15, 2009, to hear and determine all cases arising under the Election Law relating to eligibility for voting, and do assign the following Supreme Court Justices to hold such Special Term for Election Matters, in addition to their other assignments.

NEW YORK COUNTY
Board of Elections
200 Varick Street, New York, New York 10014

7:00 A.M. to 2:00 P.M.

HON. MICHAEL STALLMAN

2:00 P.M. to 9:00 P.M.

HON. EMILY JANE GOODMAN

163 West 125th Street, 8th Floor
New York, New York 10027

9:00 A.M. to 9:00 P.M.

HON. MILTON TINGLING

Dated: New York, New York
August 31, 2009

FERN A. FISHER
Deputy Chief Administrative Judge
New York City Courts

2009 SEP - 1 - PM 4: 38

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GENERAL COUNSEL
RD. OF ELECTIONS
IN THE CITY OF NEW YORK

*Comments
FYI*



Appellate Division
Supreme Court of the State of New York
Second Judicial Department
45 Monroe Place
Brooklyn, N.Y. 11201
(718) 875-1300

A. GAIL PRUDENTI
PRESIDING JUSTICE
JAMES EDWARD PELZER
CLERK OF THE COURT

MEL E. HARRIS
SUSAN H. HARKAVY
MARY-ELLEN SKENYON
DEPUTY CLERKS

MATTHEW KIERNAN
APRILANNE AGOSTINO
ASSOCIATE DEPUTY CLERKS

FACSIMILE TRANSMITTAL

To:	<i>Steve Richman</i>	Fax #:	<i>212 487 5342</i>
Company:		Date:	<i>9/3</i>
From:	<i>Sue Harkavy</i>	Time:	<i>10:35 AM</i>
Tot. # Pages:	<i>2</i>	A.D. Fax #:	(718) 858-2446

Urgent
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 Please Reply
 As Requested

Comments:

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 2009 SEP -3 AM 11:50

**Supreme Court of the State of New York
Appellate Division: Second Judicial Department**

D24385
Y/hu

____AD3d____

Argued - September 1, 2009

WILLIAM F. MASTRO, J.P.
JOHN M. LEVENTHAL
CHERYL E. CHAMBERS
SHERI S. ROMAN, JJ.

2009-07865

DECISION & ORDER

In the Matter of Isaac Sasson, petitioner-respondent,
et al., petitioner, v Board of Elections in City of
New York, respondent-respondent, Constantine E.
Kavadas, appellant.

(Index No. 20318/09)

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IN THE CITY OF NEW YORK
2009 SEP -3 AM 11:58

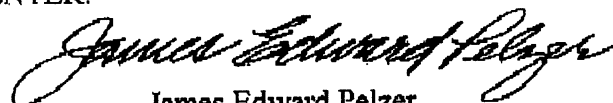
In a proceeding pursuant to Election Law § 16-102, inter alia, to invalidate a petition designating Constantine E. Kavadas as a candidate in a primary election to be held on September 15, 2009, for the nomination of the Democratic Party as its candidate for the public office of Member of the New York City Council, 20th Council District, Constantine E. Kavadas appeals from a final order of the Supreme Court, Queens County (Satterfield, J.), which, after a hearing, denied his motion to dismiss the proceeding and granted the petition to invalidate the designating petition.

ORDERED that the final order is affirmed, without costs or disbursements.

The appellant's specific contention regarding service of the order to show cause and petition was not raised before the Supreme Court and is raised for the first time on appeal. The appellant appeared in court and litigated the matter on the merits, thus waiving any challenge to service (see *Matter of Gregory v Board of Elections of City of N.Y.*, 93 AD2d 894, *aff'd* 59 NY2d 668; *Matter of Banks v Larkin*, 39 AD2d 951).

MASTRO, J.P., LEVENTHAL, CHAMBERS and ROMAN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court

September 2, 2009

MATTER OF SASSON v BOARD OF ELECTIONS IN CITY OF NEW YORK

*Comm by
Fy1*

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS**

**CIVIC CENTER AT MONTAGUE STREET
BROOKLYN, NEW YORK 11201**

JUSTICES' LIBRARY

FAX NUMBER (718) 643-4993

FAX TRANSMITTAL COVER SHEET

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IN THE CITY OF NEW YORK
2009 SEP - 1 PM 4: 39

PLEASE DELIVER TO: STEVEN RICHMAN, ESQ.

ATTENTION: _____

FACSIMILE TELEPHONE NUMBER: (212) 487-5342

SENDER: _____

NUMBER OF PAGES (INCLUDING THIS PAGE): 4

SPECIAL INSTRUCTION OR COMMENTS: _____

KING DECISION

DATE FAX SENT: 9/1/09

TIME FAX SENT: 1:28 A.M. / P.M.

NOTE: IF YOU HAVE ANY PROBLEMS WITH THIS TRANSMISSION, PLEASE
CALL THE ABOVE SENDER AT. () - _____

The documents accompanying this transmission are intended only for the use of the person or office to whom it is addressed and may contain information that is privileged, confidential, or protected by law. you are hereby notified that any copying, dissemination or distribution of this communication is prohibited.

At an IAS Term, Special Election Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 1st day of September, 2009.

PRESENT:

HON. DAVID I. SCHMIDT

Justice.

-----X

IN THE MATTER OF THE APPLICATION OF

ERLENE J. KING,

Petitioner,

- against -

THE BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondent.

-----X

The following papers numbered 1 to 4 read on this motion:

Notice of Motion/Order to Show Cause/
 Petition/Cross Motion and
 Affidavits (Affirmations) Annexed _____

Opposing Affidavits (Affirmations) _____

Reply Affidavits (Affirmations) _____

_____ Affidavit (Affirmation) _____

Other Papers _____

Papers Numbered

1-2

3-4

Index No. 700035/2009

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GENERAL COUNSEL
IN THE CITY OF NEW YORK
2009 SEP - 1 PM 4:39

Upon the foregoing papers, petitioner Erlene J. King brings this proceeding, by order to show cause dated August 24, 2009, seeking a judgment directing respondent the Board of Elections in the City of New York to "include the name of petitioner Erlene J. King and to reprint the absentee ballots for the 45th Council

District to be used in the Democratic Party Primary Elections to be held September 15, 2009." Oral argument of petitioner's application was held before the court on August 27, 2009.

In a decision and order dated August 28, 2009, the court determined that Ernest Emmanuel, Dexter A. McKenzie, Kendall Stewart, Samuel Taitt and Jumaane D. Williams were necessary parties to this proceeding. Consequently, the court directed petitioner to serve them personally pursuant to CPLR 308 (1) and adjourned the matter to Tuesday, September 1, 2009.

On the September 1, 2009 return date (i.e., today), petitioner filed affidavits of service showing that Ernest Emmanuel, Dexter A. McKenzie, Kendall Stewart and Samuel Taitt were personally served.¹ However, petitioner indicated that process servers had unsuccessfully made attempts to personally serve Jumaane Williams.² Petitioner's efforts and the circumstances of this case warrant a further opportunity for notification to Mr. Williams, the remaining necessary party. Accordingly, it is

ORDERED that this proceeding is still held in abeyance and adjourned to Thursday, September 3, 2009 at 10:30 AM before this court at Special Election Part 1 to be held at the Supreme Court Courthouse, 360 Adams Street, Brooklyn, New York, Room 541; and it is further

¹Mr. Emmanuel and Mr. McKenzie appeared in court on the September 1 return date (i.e., today).

²The court notes that petitioner faxed a copy of the papers herein to Mr. Williams' counsel in the prior proceeding that resulted in Ms. King's placement on the ballot, entitled *Williams v Board of Elections and King*, Kings County Supreme Court index No. 700024/09.

ORDERED that petitioner is directed to make service of the Order to Show Cause dated August 24, 2009, all other papers in this proceeding and a copy of the court's August 28, 2009 order and this order upon Jumaane Williams by guaranteed, overnight next day delivery to Mr. Williams' home address as well as to his campaign headquarters' address; and it is further

ORDERED that a copy of this order also be served by guaranteed, overnight next day delivery upon Kendall Stewart and Samuel Taitt at each one's home address or campaign headquarters³.

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.

³Petitioner as well as Ernest Emmanuel, Dexter A. McKenzie and the Board of Elections were notified in court of the September 3 adjourned date.

Comants
REV

At an IAS Term, Special Election Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of September, 2009.

P R E S E N T:

HON. DAVID I. SCHMIDT

Justice.

-----X
IN THE MATTER OF THE APPLICATION OF

ERLENE J. KING,

Petitioner,

- against -

THE BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondent.

-----X
The following papers numbered 1 to 6 read on this motion:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	_____
Opposing Affidavits (Affirmations) _____	_____
Reply Affidavits (Affirmations) _____	_____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Papers Numbered

_____	1-2
_____	3-4
_____	5,6
_____	_____
_____	_____

Index No. 700035/2009

2009 SEP -3 PM 4:43

RECEIVED
GENERAL COUNSEL
BD. OF ELECTIONS
IN THE CITY OF NEW YORK

Upon the foregoing papers, petitioner Erlene J. King (petitioner or Ms. King) brings this proceeding, by order to show cause dated August 24, 2009, seeking a judgment directing respondent the Board of Elections in the City of New York (the Board) to "include the name of petitioner Erlene J. King and to reprint the absentee ballots for the 45th Council District

to be used in the Democratic Party Primary Elections to be held September 15, 2009.”¹

Background Facts

This court issued a decision and order dated August 13, 2009, entitled *Williams v Board of Elections and King*, Kings Supreme Court index No. 700024/09, denying the petition of Jumaane Williams, a rival candidate seeking to invalidate Ms. King’s designating petition and concurrently granting Ms. King’s cross claim to validate her petition. The ruling found that the Board improperly invalidated her petition on the basis of a minor clerical cover sheet error. The order directed the Board to place petitioner’s name on the ballot for the September 15, 2009 Democratic Primary Election in the 45th Council District.² Neither the Board nor Mr. Williams appealed that decision and order.

However, petitioner discovered on August 20, 2009 that her name was not included on the absentee ballots to be used for the 45th Council District Democratic Party Primary Election.³ She instituted the instant proceeding seeking an order directing the Board to

¹Petitioner’s counsel thereafter sought, for the first time, at further oral argument on September 3, 2009 to dispense with all military, absentee and special ballots. However, the court regards such application for new relief as untimely.

²The court had directed a line by line review of de novo specifications submitted by Mr. Williams, and that review showed that Ms. King had 2,016 valid signatures, 1,116 more than the 900 needed for placement on the ballot.

³The Board, according to the August 26, 2009 affidavit of Steven H. Richman, Esq. and Exhibit B, annexed thereto, had mailed 2,085 military, absentee and special ballots as of August 22, 2009 to voters in the 45th Council District (which includes portions of the 41st, 42nd, 43rd, 44th, 45th, 58th and 59th Assembly Districts). Mr. Richmond represented at further oral argument on September 3, 2009 that presently about 2,500 such ballots, mainly those who recurrently vote by absentee ballot, had now been issued.

(continued...)

reprint the absentee ballots for the 45th Council District Primary Election to include her name as a candidate for said position.

In a decision and order dated August 28, 2009, the court determined that Ernest Emmanuel, Dexter A. McKenzie, Kendall Stewart, Samuel Taitt and Jumaane D. Williams were necessary parties to this proceeding. Consequently, the court directed petitioner to serve them personally pursuant to CPLR 308 (1) and adjourned the matter to Tuesday, September 1, 2009.

On the September 1, 2009 return date, petitioner filed affidavits of service showing that Ernest Emmanuel, Dexter A. McKenzie, Kendall Stewart and Samuel Taitt were personally served. (Mr. Emmanuel and Mr. McKenzie appeared in court on the September 1, return date.) However, petitioner indicated that process servers had unsuccessfully made attempts to personally serve Jumaane Williams. The court afforded petitioner a further opportunity for notification to Mr. Williams, the remaining necessary party and adjourned the matter to today, September 3, 2009.

Petitioner filed an affidavit of service demonstrating compliance with the court's September 1, 2009 order regarding service on Jumaane Williams and heard further oral argument including the statements of Mr. Emmanuel and Mr. McKenzie who once again

³(...continued)

In addition, Mr. Richman noted that the Board had begun sending inspectors, yesterday, September 2, 2009, to nursing homes and other facilities covered under Election Law § 8-407 to enable residents therein to cast absentee ballot votes. He acknowledged that the statute, specifically, Election Law § 8-407 (3) provides that such process shall occur "[n]ot earlier than thirteen days before *or later than the day before such an election . . .*" (emphasis added). Hence, the Board has acted before the court's determination herein.

appeared in court. These latter two rival candidates supported the equitable concept that Ms. King's name should appear on the absentee ballots.

The Parties' Contentions

Petitioner argues in her papers and orally that the Board's failure to include her name on the absentee ballots damages her candidacy, could thus prevent her from being elected to the office she seeks and represents continuation of a pattern of improper conduct by the Board affecting her candidacy. This pattern allegedly includes the Board contravening its own rules in failing to timely notify her of the cover sheet defect and in removing her name from the ballot for this allegedly insubstantial cover sheet defect.

The Board retorts in opposition that it has complied with the court's August 13, 2009 order which only directed that petitioner be placed on the ballot, not the absentee ballot. The Board states that petitioner's name appears on the printed strip that will be used in the lever voting machines as well as on the standby and paper ballots that will be used as both emergency and affidavit ballots on Primary Day. The Board states that its Commissioners met and voted to print absentee ballots on August 5, 2009, a full eight days prior to this court's decision. This vote determined which candidates were duly designated or nominated to be placed on the absentee ballot for the September 15, 2009 Primary Election. The Board argues that Election Law §7-122 (4) provides that the Board's determination "shall be final and conclusive."

Moreover, the Board contends that Election Law §7-122 (1) (a) only requires that the

absentee ballot be "as nearly as practical" in the same form as the ballot voted in the district on primary election day. The Board avers that it would be "impractical, if not impossible" to add an additional candidate to the absentee ballots after the Board has made its final and conclusive determination regarding which candidates are qualified to be placed on the ballot. The Board further argues that Election Law § 9-104 (1) (c) provides that "if there is more than one ballot envelope executed by the same voter, the one bearing the earlier date of execution shall be accepted and the other rejected." Thus, the Board contends even if it were to issue corrected absentee ballots, such ballots would be mooted if the absentee voter already cast a vote with the original absentee ballot.

Finally, the Board contends that it is precluded from now issuing corrected non-military absentee ballots inasmuch as Election Law § 10-108 (1) requires that military ballots be mailed 32 days before a primary or general election,⁴ and Election Law § 7-123 (2) requires that military ballots "be in the same form as those to be voted by absentee voters."

Discussion

Article II, § 2 of the New York Constitution, adopted in 1919, states that "[t]he legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who, on the occurrence of any election, may be absent from the county of their residence or . . . may be unable to appear personally at the polling place because of illness or physical disability, may vote and for the return and canvass of their votes." Thus,

⁴Non-military absentee ballots, in contrast, need only be mailed to qualified recipients "as soon as practicable" after the Board has determined such qualified recipient's right thereto (*see* Election Law § 8-406).

in New York, the right to vote by absentee ballot is purely a statutory right (*see* NY Const art II, § 2; Election Law § 8-400; *see Gross v Albany County Bd. of Elections*, 3 NY3d 251, 255 [2004]).

To this end, New York State has enacted various provisions of the election law relating to absentee voting including, but not limited to, Election Law § 8-400 governing the application and requirements for an absentee ballot; §7-122 governing the form of absentee ballots and § 9-104 relating to the casting of absentee ballots. It has been held that “the failure to furnish voters with corrected ballots, where feasible, contravenes both article II, § 1 of the New York Constitution, providing that ‘[e]very citizen shall be entitled to vote at every election for all officers elected by the people,’ and article II, § 2, providing for voting by absentee ballot” (*Powers v Donahue*, 276 AD2d 157, 160 [2000] *app den* 95 NY2d 769 [2000]).

Election Law § 16-104 (1) pertinently provides in this regard that the “content of any ballot, or portion thereof, to be used in an election * * * may be contested in a proceeding instituted in the supreme court by any aggrieved candidate . . .” The Appellate Division, Second Department therefore has noted “[c]learly, that provision contemplates action prior to the election rather than subsequent thereto” (*Flake v Board of Elections of New York City*, 122 AD2d 94, 96 [1986] *app den* 68 NY2d 752 [1986] [dismissing candidate’s post-election action holding that the candidate had sufficient time to seek judicial intervention prior to the election to rectify the omission of his name on the absentee and military ballots, and he failed

to do so and thus "slept on his rights"]; see *Paroli v Paroli*, 269 AD2d 340, 341 [2000] *app den* 94 NY2d 759 [2000] [holding that candidate's failure to avail himself of affirmative relief from the court pursuant to Election Law § 16-104 in order to insure that the ballot would be changed prior to the election, prevented him from seeking relief after the election].

Here, the court finds that petitioner is properly asserting her right to challenge the content of the absentee ballot and is doing so before the Primary Election, a time which courts have determined, as mentioned above, is appropriate for judicial intervention in such matters.

The court notes that *Powers v Donahue* (276 AD2d at 160) involved a situation where the Board, upon determining that some absentee ballots mailed to voters in one district listed the wrong candidates for state senator, subsequently sent a second set of absentee ballots to these absentee voters informing them the first ballot was defective and requesting they use the second ballot. The *Powers* court noted that "[w]hile the Election Law does not expressly provide for the mailing of corrected absentee ballots to remedy a defect, it would be anomalous to provide for a proceeding to compel delivery of a proper absentee ballot, yet preclude the Board of Elections from correcting the mistake itself." Thus, the court here finds that the Board's contention that it would be "impractical, if not impossible" to add an additional candidate to the absentee ballots after the Board has made its final and conclusive determination regarding which candidates are qualified to be placed on the ballot is disingenuous at best.

The court recognizes that Election Law § 7-122 (4) provides that the Board's determinations "shall be final and conclusive with respect to such offices for which petitions or certificates are required to be filed . . ." However, the law further provides that a court of competent jurisdiction can determine "at a later date that any such certification, designation or nomination is invalid and, in the event of such later determination, no vote cast for any such nominee by any voter shall be counted at the election." Consequently, the court or the Board can determine that a candidate should not have been placed on an absentee ballot and disallow the counting of votes for said candidate. The *Flake* decision clearly implies (122 AD2d at 96) that the court can equally revise a previously certified ballot to direct placing a qualified candidate on an absentee ballot and require that votes cast for such candidate be counted provided, as here, that the candidate seeks such relief before the primary election. "The right of the voter to be safeguarded against disenfranchisement and to have his intent implemented wherever reasonably possible ... transcends technical errors" (*Matter of Weinberger v Jackson*, 28 AD2d 559 [1967], *affd* 19 NY2d 995 [1967]). "[V]oters should not be [disenfranchised] for a mistake ... of election officials in performing the duty cast upon them" (*Matter of Luck v Fisk*, 243 AD2d 812, 813 [1997] *affd* 90 NY2d 979 [1997] [internal citations and internal quotation marks omitted]). In addition, it is conceivable that absentee ballots could ultimately determine the instant primary election involving five candidates seeking the Democratic Party nomination for this City Council seat. Petitioner in such circumstance obviously would have no chance of prevailing if her name is excluded from the absentee ballots.

The equivalency required by Election Law § 7-123 (2) for military and absentee ballots equally fails to prevent granting relief herein. No prohibition exists preventing issuance of corrected military and absentee ballots after the statutory 32 day mailing requirement of Election Law § 10-108 (1). Indeed, that same provision requires the Board even after the 32 day period to provide a qualified military voter with a military ballot provided the Board receives such request no later than seven days before the election for which the ballot is requested.

Here, qualified military voters undoubtedly expect to receive a proper ballot listing all qualified candidates and thus need not now request a corrected ballot. Issuing corrected military ballots matching corrected absentee ballots, especially where election officials improperly acted causing the exclusion of petitioner's name from the original military ballot, thus achieves equivalency between both ballots and enables fully enfranchising both groups. Such relief emerges as most appropriate. Accordingly, it is

ORDERED that the Board is directed to reprint the absentee and military ballots relating to the 45th Council District and include petitioner's name as a candidate on the absentee and military ballot for the September 15, 2009 Democratic Primary Election in the 45th Council District. Such reprinted ballots shall be sent by priority mail to all qualified voters and military personnel that previously requested and received an absentee or military ballot in this district. The reprinted ballots shall include a notice from the Board informing the absentee and military voters in the 45th Council District that the first ballot was defective

and requesting they complete and return the corrected ballot by the appropriate date. Such reprinted ballots alone shall also be mailed to all persons in this district initially requesting an absentee or military ballot subsequent to the issuance of this order. It is further

ORDERED that in cases where more than one absentee or military ballot is returned by a voter, the Board is directed to accept for canvassing only the corrected ballot if postmarked on or before September 15, 2009 (*see Powers, 276 AD2d at 161*). However, the Board shall count the uncorrected ballot in those cases where a voter returns an uncorrected ballot without returning a corrected ballot. Finally, it is

ORDERED that all absentee ballots to be cast pursuant to Election Law § 8-407 include the name of Erlene J. King and that inspectors previously dispatched pursuant to Election Law §8-407 return to those facilities previously visited where absentee ballots were already cast. The inspectors shall issue corrected ballots plus the notice of defect and request that those who have already voted complete and return the corrected ballot at this return visit. The Board is again directed to accept for canvassing only the corrected ballot (*see Powers, 276 AD2d at 161*). However, the Board shall count the uncorrected ballot in those cases where a voter does not return a corrected ballot and has only returned an uncorrected ballot.

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.

Comm nb
Pg 2

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----x

SALIM EJAZ,

Petitioner,

Index No. 112446/2009

-against-

BOARD OF ELECTIONS IN THE CITY OF NEW
YORK,

Respondent,

For an order, pursuant to Sections 16-100, 16-102, and 16-116 of the Election Law, declaring valid the Amended Cover Sheet already submitted regarding the designating petitions which designated the Petitioner-Candidate as a candidate for the Public Office of City Comptroller of the City of New York in the General Election to be held on November 3, 2009.

-----x

**THE BOARD OF ELECTIONS IN THE CITY
OF NEW YORK'S MEMORANDUM OF LAW
IN OPPOSITION TO THE PETITION TO
VALIDATE THE NOMINATING PETITION**

Salim Ejaz, the petitioner herein, brings this action in an effort to validate his independent nominating petition (the "Petition") to appear on the ballot for the public office of Comptroller of the City of New York in the November 3, 2009 General Election. Ejaz argues that the Amended Cover Sheet that he filed in connection with the Petition was in substantial compliance with the Rules of the Board of Elections in the City of New York's (the "Board of Elections") Independent Nominating Petition Rules for the November 3, 2009 General Election

(the “Rules”),¹ and the New York Election Law, notwithstanding that the Amended Cover Sheet lacked the required certification that the filer was authorized to file the Amended Cover Sheet. Because this certification, and anti-fraud provision of the Board of Elections’ Rules was not complied with, – a fact that is not disputed – the Board of Elections properly determined that the Petition was invalid. Petitioner’s claim that the Board of Elections’ notice that his name would not appear on the ballot was defective because it referred to the wrong rule – C4, not C3 – is nothing more than a red herring which would entitle him to nothing more than a new notice.

STATEMENT OF FACTS

The facts underlying this proceeding are undisputed. The Cover Sheet filed with the Petition was defective and Petitioner was provided timely notice of such defect. On August 24, 2009, Petitioner timely filed an amended cover sheet that lacked the requisite certification. On August 25, 2009, a subcommittee of the Board determined that the Amended Cover Sheet did not constitute a valid cure due the omission of the certification. On August 27, 2009, the Board sent Petitioner a notice stating that his name would not appear on the ballot. On August 31, 2009, Petitioner filed a Second Amended Cover Sheet with the Board of Elections that, on September 1, 2009, was determined to be not having been timely filed and therefore not considered. This proceeding followed.

¹ The Rules are available on the Board of Elections’ website at <http://vote.nyc.ny.us/pdf/documents/boe/Adopted2009IndependentNominatingPetitionRules.pdf>.

ARGUMENT

POINT I

PETITIONER'S TOTAL NON-COMPLIANCE WITH RULE C3 DOES NOT CONSTITUTE SUBSTANTIAL COMPLIANCE.

Petition argues that even absent the certification in the Amended Cover Sheet required by Rule C3 of the Board of Elections, it was in substantial compliance with the Rules and the Election Law. The Board of Elections respectfully disagrees.²

Rule C3 of the Board of Elections Rules states as follows:

An amended cover sheet must clearly identify the original cover sheet, which it is amending, or attach a copy of the original cover sheet, which it is amending. The amended cover sheet must contain all the information required of a cover sheet. Amended cover sheets must contain the following authentication: "This is to certify that I am authorized to file this amended cover sheet." Said authentication must be signed and dated and shall include the printed name, address, and may include the office telephone number and fax number of said candidate or representative.

Unlike some rules and sections of the Election Law, Rule C3 cannot be fairly described as being cumbersome or archaic. Compliance with this rule is, on its own, easy, and made even easier by the Board of Elections' production of a sample form of an amended cover sheet. More importantly, however, is the anti-fraud purpose of Rule C3's certification requirement.

² The Board of Elections notes that in a case with similar facts – the amended cover sheet that lacked the certification was filed by the candidate's designated contact person – the Appellate Division, Second Department, determined that the Amended Cover Sheet was in substantial compliance with the Board of Elections' rules and the Election Law. *Magelaner v. Park*, 32 A.D.3d 487 (2d Dep't 2006).

The certification requirement of the amended cover sheet is vital to the integrity of the electoral process and seeks to avoid mischief by people filing amended cover sheets without authorization. *See Etkin v. Thahrnann*, 287 AD2d 775, 777 (3d Dept. 2001) (recognizing the possibility of fraud and the need to “protect the integrity of the electoral process, upon which the Board relies”). Moreover, the Board of Elections relies upon these certifications when making their rulings as to whom has access to the ballot. Thus, when literally thousands of petitions are filed with the Board of Elections, most of which are required to be filed with cover sheets, the certification requirement ensures that the system functions efficiently and effectively.

Petitioner argues that the Court should create an exception to Rule C3 where the candidate him/herself files an amended cover sheet because it could not possibly be fraudulent or impact the integrity of the process. Such a proposition cannot stand. Petitioner seeks to have two rules for the filing of Amended Cover Sheets – one for situations where they are filed by the candidate him/herself, and one where they are filed by a third party. Such a rule would improperly impose different requirements on different candidates, based solely upon who made the filing, and create the potential for confusion.

In addition, the Board of Elections, together with the Rules, publishes a booklet of election forms, which includes both a cover sheet and an amended cover sheet. This booklet is made available in hard copy at each of the Board of Elections’ offices as well as online at <http://vote.nyc.ny.us/pdf/forms/nys/allelectionsforms.pdf>. Because the Board of Elections produced sample forms and makes them publicly available, it would require the creation of multiple different amended cover sheet forms. This would likely create additional confusion leading to persons using the wrong amended cover sheet form, causing more potential candidates to be ruled off of the ballot, leading to more and more litigation.

POINT II

THE TYPOGRAPHICAL ERROR IN THE NOTICE DATED AUGUST 27, 2009, IN INCONSEQUENTIAL.

Petitioner tries to make great hay out of the typographical error in the Board of Elections' notice dated August 27, 2009, which incorrectly referred to Rule C4, not Rule C3. This argument is wholly without merit as it did not affect his rights in any manner whatsoever. First, this August 27 Notice was not substantive, but only served as notice that his name would not appear on the ballot. The reason for his removal was clearly stated in the letter – that is – that the Amended Cover Sheet lacked the requisite certification. This provided him with the notice necessary to commence this action in a timely fashion, which he did. Moreover, to the extent that the Court were to find the August 27, 2009 Notice defective, the remedy would be to simply re-issue that notice, thereby restarting the time by which he has to commence a validating proceeding. Of course, given that he has already commenced a validating proceeding on this very issue, such a remedy would provide no additional benefit to petitioner.

CONCLUSION

For the reasons set forth herein, respondent Board of Elections in the City of New York respectfully requests that the Court enter an order denying the relief requested and dismissing the Petition in its entirety, and for such other and further relief as is just and proper.

Dated: New York, New York
 September 4, 2009

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for Defendant Board of
Elections in the City of New York
100 Church Street, Room 2-126
New York, New York 10007
(212) 788-0849
e-mail: SKitzing@law.nyc.gov

By: _____
Stephen Kitzinger
Assistant Corporation Counsel

Comments

F42

UNITED STATES DISTRICT COURT
for the
Southern District of New York

Jose Adams

09 CV 7698

Plaintiff

Civil Action No.:

v.

New York City Board of Elections

Defendant

SUMMONS IN A CIVIL ACTION **JUDGE KOELTL**

To: (Defendant's name and address)

RECEIVED
G.O. BD. OF ELECTIONS
IN THE CITY OF NEW YORK
2009 SEP - 4 P 12: 59

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it) or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff(s) attorney, whose name and address are:

PRO SE - Jose Adams
641 West 207 Street 1A
New York, N.Y. 10034

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

J. MICHAEL McMAHON
CLERK OF COURT

Catherine Lapsley

Signature of Clerk or Deputy Clerk

Date: SEP - 4 2009

JUDGE KAHN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

09 CV 7698

JOSE ADAMES

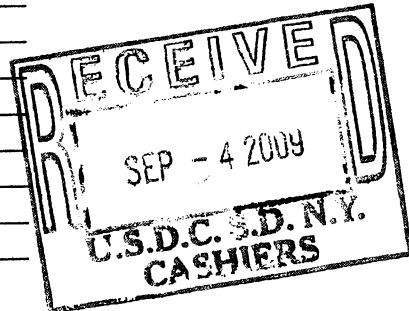
(In the space above enter the full name(s) of the plaintiff(s).)

COMPLAINT

-against-

Jury Trial: Yes No
(check one)

New York City Board of
Elections



(In the space above enter the full name(s) of the defendant(s). If you cannot fit the names of all of the defendants in the space provided, please write "see attached" in the space above and attach an additional sheet of paper with the full list of names. The names listed in the above caption must be identical to those contained in Part I. Addresses should not be included here.)

I. Parties in this complaint:

A. List your name, address and telephone number. If you are presently in custody, include your identification number and the name and address of your current place of confinement. Do the same for any additional plaintiffs named. Attach additional sheets of paper as necessary.

Plaintiff Name JOSE ADAMES
Street Address 641 West 207 Street
County, City New York
State & Zip Code New York 10034
Telephone Number 718-825-3036

B. List all defendants. You should state the full name of the defendant, even if that defendant is a government agency, an organization, a corporation, or an individual. Include the address where each defendant may be served. Make sure that the defendant(s) listed below are identical to those contained in the above caption. Attach additional sheets of paper as necessary.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

_____ X

Jose Adames

Plaintiff

vs.

Defendant

NYC Board of Elections
X

: ORDER TO SHOW CAUSE FOR
: PRELIMINARY INJUNCTION AND
: TEMPORARY RESTRAINING ORDER

Upon the affidavits of Jose Adames sworn to the 2nd day of September 20 09, and upon the copy of complaint hereto annexed, it is ORDERED, that the above named defendants show cause before a motion term of this court, at Room _____, United States District Court for the Southern District of NY, 500 Pearl Street, in the City, County and State of New York on _____, 20 _____, at _____ o'clock in the _____ noon thereof, or as soon thereafter as counsel may be heard, why an order should not be issued pursuant to Rule 65 of the Federal Rules of Civil Procedure enjoining the Defendants during the pendency of this action from celebrating The Primary Elections of September 15, 2009, of New York City

The defendant have no case. Violating Elections Law 6215.6 (a)(b). and it is further ORDERED, that sufficient reason having been shown, therefore, pending the hearing plaintiff's application for a preliminary injunction, pursuant to FRCP Rule 65 the defendants are temporarily restrained and enjoined from

Celebrating The Primary Elections of September 15, 2009, of New York City.

_____; and it is further ORDERED, that security in the amount of \$ N/A be posted by the plaintiffs and it is further ORDERED, that personal service of a copy of this order and annexed affidavit upon the defendants or his counsel on or before _____ o'clock in the _____ noon, _____, 20____, shall be deemed good and sufficient service thereof.

DATED: _____
New York, New York

Issued: _____

United States District Judge

AT approximately noon time, Thursday September 5, 2009, I called again to the New York City Board of Elections, and let ^{them} Ms Aguerri, that an application would be made by Plaintiff of a Temporary Restraining Order, and an Order directing them to show cause, why they should not be preliminarily enjoined. Previous MSG was in the answering mail.

This motion have been brought by an order to show cause, because the Primary election are just 10 days away.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Jose Adames,
Plaintiff,
-against-
NYC Board of Elections,
Defendant

AFFIDAVIT/AFFIRMATION

_____ Civ. _____ ()

STATE OF NEW YORK
COUNTY OF MANHATTAN

Jose Adames makes the following affirmation under the penalties of perjury or being duly sworn deposes and says

I, JOSE Adames, as plaintiff in the above entitled action, respectfully move this court to order defendants to show cause why they should not be enjoined from/to Celebrating the Primary Elections of until a final deposition on the merits in the above entitled action. September 15, 2009

Unless this order is issued, I will suffer immediate and irreparable injury, loss and damage in that no participation in The Primary elections of September 15, 2009; and further relief, see papers added

As can be seen from the foregoing, I have no adequate remedy at law.

The defendant has no case.

WHEREFORE, I respectfully request that the court grant the within relief as well as such other and further relief that may be just and proper.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 09-02-09

[Signature]

[or for an affidavit]

Sworn to before me this SEP 03 day of 2009

Margaret A. Schwartz
Notary Public

MARGARET A. SCHWARTZ
Notary Public, State of New York
Reg. No. 04SC6152068
Qualified in New York County
Commission Expires Aug. 23, 2010

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSE ADAMES

(In the space above enter the full name(s) of the plaintiff(s).)

COMPLAINT

-against-

Jury Trial: Yes No
(check one)

New York City Board of
Elections

(In the space above enter the full name(s) of the defendant(s). If you cannot fit the names of all of the defendants in the space provided, please write "see attached" in the space above and attach an additional sheet of paper with the full list of names. The names listed in the above caption must be identical to those contained in Part I. Addresses should not be included here.)

I. Parties in this complaint:

- A. List your name, address and telephone number. If you are presently in custody, include your identification number and the name and address of your current place of confinement. Do the same for any additional plaintiffs named. Attach additional sheets of paper as necessary.

Plaintiff Name JOSE ADAMES
Street Address 641 West 207 Street
County, City New York
State & Zip Code New York 10034
Telephone Number 718-825-3036

- B. List all defendants. You should state the full name of the defendant, even if that defendant is a government agency, an organization, a corporation, or an individual. Include the address where each defendant may be served. Make sure that the defendant(s) listed below are identical to those contained in the above caption. Attach additional sheets of paper as necessary.

Defendant No. 1 Name Steven Richman
 Street Address NYC Board of Elections
32 Broadway, 7 Floor
 County, City New York
 State & Zip Code New York 10004-1609
 Telephone Number 212-487-5338

Defendant No. 2 Name NYC Law Department
 Street Address 100 Church Street Room 2124
 County, City New York
 State & Zip Code New York 10007-2601
 Telephone Number 212-788-0809

Defendant No. 3 Name Stephen Kitzinger
 Street Address _____
 County, City _____
 State & Zip Code _____
 Telephone Number _____

Defendant No. 4 Name _____
 Street Address _____
 County, City _____
 State & Zip Code _____
 Telephone Number _____

II. Basis for Jurisdiction:

Federal courts are courts of limited jurisdiction. Only two types of cases can be heard in federal court: cases involving a federal question and cases involving diversity of citizenship of the parties. Under 28 U.S.C. § 1331, a case involving the United States Constitution or federal laws or treaties is a federal question case. Under 28 U.S.C. § 1332, a case in which a citizen of one state sues a citizen of another state and the amount in damages is more than \$75,000 is a diversity of citizenship case.

A. What is the basis for federal court jurisdiction? (check all that apply)
 Federal Questions Diversity of Citizenship

B. If the basis for jurisdiction is Federal Question, what federal Constitutional, statutory or treaty right is at issue? Elections Law, Unlawful practice and Action For Employment Discrimination Violation of Constitutional and Civil Rights.

C. If the basis for jurisdiction is Diversity of Citizenship, what is the state of citizenship of each party?
 Plaintiff(s) state(s) of citizenship — N/A
 Defendant(s) state(s) of citizenship — N/A

III. Statement of Claim:

State as briefly as possible the facts of your case. Describe how each of the defendants named in the caption of this complaint is involved in this action, along with the dates and locations of all relevant events. You may wish to include further details such as the names of other persons involved in the events giving rise to your claims. Do not cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Attach additional sheets of paper as necessary.

A. Where did the events giving rise to your claim(s) occur? July August 27, 2009

B. What date and approximate time did the events giving rise to your claim(s) occur? Primary Elections, September 15, 2009

C. Facts: The Board of Elections removed my name from the ballot illegally on July 27, 2009.

What happened to you?

Who did what?

Was anyone else involved?

Who else saw what happened?

Mr. Steven Richman and supposedly the Commissioners of the Board.
No.
many Board's Employee and many on the public.

IV. Injuries:

If you sustained injuries related to the events alleged above, describe them and state what medical treatment, if any, you required and received. May Lose My Participation in the election and many other things. Please see The papers added.

V. Relief:

State what you want the Court to do for you and the amount of monetary compensation, if any, you are seeking, and the basis for such compensation.

To be returned To The ballot and delay the elections for Mayor, for a month, Plus See paper added.

If it is no possible To be returned To The Primary ballot, To be placed in The ballot for The General Elections, To have a fair Participation and To be voted by the people.

I declare under penalty of perjury that the foregoing is true and correct.

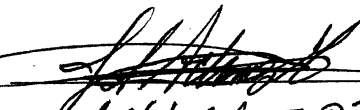
Signed this 2 day of September 09

Signature of Plaintiff

Mailing Address

Telephone Number

Fax Number (if you have one)


1641 W. 207 ST. 1A
New York NY
10034
718 (825) 3036
718-825-3036

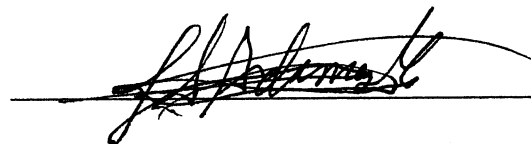
Note: All plaintiffs named in the caption of the complaint must date and sign the complaint. Prisoners must also provide their inmate numbers, present place of confinement, and address.

For Prisoners:

I declare under penalty of perjury that on this _____ day of _____, 20____, I am delivering this complaint to prison authorities to be mailed to the Pro Se Office of the United States District Court for the Southern District of New York.

Signature of Plaintiff:

Inmate Number



09-02-09

To the Honorable Judge.

Please, stop the "HATE CRIME" that is practiced by The New York City Board of Elections against Jose Adams.

This is the second time, that Mr. Steven Richman created false and Frivolous arguments, not to let Jose Adams to run for office.

IT is incredible That The Commissioners Make Mockery at us, just to please a biased General counsel, that is violating The Law, abusing his power, just to sell political favors.

I STOP HATE CRIME!

Hate crime § U.S.A 1983

Order To Show Cause
In Emergency!

09-02-09

To: The Honorable Judge.

Please, notice That, just Last Thursday August 25, 2009, The Board of Elections Took The Last gamble at us; after listening To Mrs. Leonor Datil, he told her, To bring some Paper To him and he will look at them, Mr. Umone. The papers were mailed, and Then were faxed from The Board's office to his Private office; as shown in Exhibit-10, August 27, 2009, Thursday. Then, he called Mrs. Datil, and Told her that he sent The Papers to every Commissioner, and That the Case may be re-opened. We waited until Tuesday, September 1st, 2009; but, when we got To The hearing, he didn't Let us Talk, because, every Commissioner by separate decided not to hear the case again; violating our rights and ignoring The NYS Elections Law; That's why it took so late To bring the papers To The court.

Respectfully submitted ~~Jose Adams~~
Jose Adams

AN EMERGENCY ORDER TO SHOW CAUSE with TRO

VENUE. COMMON VENUE

FEDERAL QUESTION

1,2, 3,4, 5, ETC

ACTION FOR EMPLOYMENT DISCRIMINATION, UNLAWFUL PRACTICE.

TITLE VII.

ACTION UNDER § 42 U.S.C FRCP (3)

UNLAWFUL EMPLOYMENT ACTION; PROVISION 28

QUESTION ARISING UNDER § 28 U.S.C. 1331 1391 (V) CIVIL ACTION.

VIOLATION OF CONSTITUTIONAL RIGHTS

ENTRAPMENT

CONTENT

1 An urgent petition for an Emergency Order To Show Cause with a Temporary Restraining Order (TRO) to delay the Primary Democratic Elections for Mayor of September 15, 2009; and compensation for damages to the campaign.

Mr. Steven Richman, the Board of Elections General Counsel have got my candidacy out of the ballot, illegally for more than a month; causing a lot's of damages to it. 1 - 3pages

2-Letter to the commissioners August 24, 2009; about the state law, that made the whole case illegal. 6215.6 (a) and (b).

3-Motion for Disclosures. The whole case was started late, according to Rules.

4-Conspiracy at the New York City Board of Elections 1 - 5

5 **Redress of Grievance 1 - 5** *by Leonor Datil*

EXHIBITS

Exhibit -1, It shows the list of candidate, where my name was showing for six days.

Exhibit -2 - 2A; The letter used by Mr. Richman, to initiate his attack against my candidacy, It bear the same date of the candidate list. He initiated his illegal attack, with prejudice, as soon as he saw my name appeared in the list.

Exhibit -3 - 3A; The amended Cover sheet and the original one, in compliance with the law, that were timely filed; with the ID Number as it was provided by the Board's employee (795) and as it appear in the candidate list (exhibit -1)

Exhibit -4; The letter sent by Mr. Richman, illegally announcing that he removed me from the ballot. It is signed by an UNKNOWN COMMISSIONER (Diana) which name does not appear among the commissioners or staff, as you can check in top of the page.

Exhibit - 5, The ROLL CALL of the commissioners decision where the granted me the return to the ballot; 3 (yes) One (no) and six abstention, a winning.

But, Mr. Richman is refusing to recognize the commissioners decision keeping me out of the ballot for more than a month

Exhibit - 6, A copy of the front page of the Order To Show Cause, served to the Board; It shows the date of serving (stamp to the right) Together ^{with} Exhibit 6, show that the case was initiated timely at the NYS Supreme Court; the law allow three days.

Exhibit - 7 - 7F, The wrong and non final decision of the Special Referee, Howard Levanthal,; dismissing the case as " untimely "

The papers were served to defendants and the court, within the three business day of limitation.

Exhibit - 8, The final Decision of judge Edward Lehner; an invalid decision, I was not told about the second hearing,

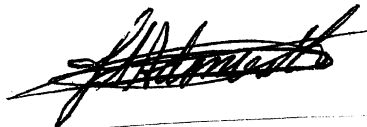
I got the referee decision two days latter, showing that I was at the court that date, and the told me nothing, and I was in the same chamber, of judge Lehner, which was borrowed by the referee.

As you can see, the original judge assigned was Judge Bberry Klein Hettler, I don't even know why they changed the judge.

Exhibit - 9, shows a copy of the NYS Election Law, that issupposed to stop all this legal brawling and litigation; the law said that they can not take me out of the ballot because any failure about Identification Number; but, the Board of Elections is refusing to recognize The New York State Election Law.

Exhibit 10, Proff of service , the Board office faxed the redress of grievance to the office of Mr. Mr. Fred Umane.

Respectfully submitted:



**Dated : *September 01, 2009*
New York, NY 10034**

**Jose Adames
641 West 207 Street, 1A
New York, N.Y. 10034
(718) 825 - 3030**

New York 09 - 01 - 2009

! An Urgent Petition !

**For a Temporary Restraining Order (TRO)
To Delay the Primary Elections of September 15, 2009; for at least a
month**

From : Jose Adames Candidate for mayor

To: the Honorable judge of the Federal Court of Manhattan

**Against : The Commissioners
New York City Board of Elections**

**Mr. Marcus Cederqvist
Executive Director
32 Broadway 7Fl . New York, N.Y. 10004**

**Subject : Petitions of Jose Adames For Mayor
NY 000796**

Dear Sirs;

**On July 21, 2009, Mr. Steven Richman, The General
Counsel; initiated an illegal process against my petition, based on a
supposed failure on Identification Number; inducing the Board of
Elections and the NYS Supreme Court, to mistakes to a virtual
crime against my petition, looking to invalidate them, because of a
supposed failure on Identification Number.**

**Added in here is a copy of the :
Election Law 6215.6 CONSTRUCTION OF RULES: SUBSTANTIAL
COMPLIANCE
which said:**

(a) “ Technical defects shall be disregarded where there has been substantial compliance “

There was substantial compliance.

and :

(b) Failure to obtain an identification number or to inscribe an identification number on one or more petitions..... shall not render such petition invalid

There were no objections to my petitions. Not even legal reason to invalidate the petitions.

According to the above, the attacks to my petition initiated by Mr. Richman, was illegal and vicious, causing a lot of damages to my campaign.

After the positive decision from the commissioners, on August 3, 2009; Exhibit A. He has arbitrarily and illegally, keeping my candidacy out of the ballot, already for more than a month; making me expend a lot of money in court; but most of all keeping my campaign frozen without having any reason whatsoever, except for his prejudice and discrimination; supposedly because of a new rule of his invention.

The result is a clear one, of 3 votes (Yes) against one (No) and 6 abstention. He has other opinion, like a child that refuses to lose.

He has no case, but, he continues disobeying the commissioners decision; but, most of all; inducing them not to listen to me.

The commissioners keep violating all my constitutional rights, my Freedom of Speech, my rights to run for office; violating the law and his own rules, and making mockery of me and all the people that comes with me, to their hearings. Already five hearings,

While showing no intention to listening or reconsidering the case; and while a full campaign is taking place, toward the Primary Elections of September 15, 2009.

Wherefore, from all of the above, and the evidences submitted; we respectfully move this court for an order to restore the candidacy of Jose Adames to the ballot for the Primary Elections of September 15, 2009.

They have caused us, a lot of Damages, in many different ways, for which were claiming the following compensations:

- 1. The Frozen of the campaign for a full month, with all the related damages due to unnecessary work, anguish, tension, etc. \$ 50, 000.00**
- 2. For loosing the *video VOTER Guide* ----- \$ 150, 000.00**
- 3. For loosing the second debate at NY-1 News - - - - \$ 450.000.00**
- 4. *The Voter Guide MAGAZINE* - - - - - \$ 500.000.00**

And as much as the court consider just and proper

Respectfully submitted; 

Jose Adames

**Dated : *September 1, 2009*
New York, NY 10034**

**641 West 207 Street, 1A
New York, N.Y. 10034
(718) 825 - 3030**

New York-08 -24 - 2009

To: The Commissioners
New York City Board of Elections

By : Mr. Marcus Cederqvist
Executive Director
32 Broadway 7Fl . New York, N,Y. 10004

RECEIVED
G.O. BOARD OF ELECTIONS
IN THE CITY OF NEW YORK
2009 AUG 24 PM 3: 11

Subject : Petitions of Jose Adames For Mayor
NY 000796

Dear Sirs;

On July 21, 2009, Mr. Steven Richman, The General Counsel; initiated a process against my petition, because of a supposed failure on Identification Number; inducing the Board and the Court to a virtual crime against my petition, to invalidate them, because of the supposed failure.

Added in here is a copy of the Election Law 6215.6 which said:
(a) “ Technical defects shall be disregard where there has been substantial compliance “ and :
(b) Failure to obtain an identification number or to inscribe an identification number on one or more petitions..... shall not render such petition invalid

According to the above, the case initiated by Mr. Richman, was illegal and vicious, causing a lot of damages to my campaign.

By this way, I'm respectfully requesting that my candidacy be restore immediately to the ballot, to avoid further damages.

Sincerely, yours,



Jose Adames

P.O.Box 22 Inwood Sta. N.Y. 100034

(718) 825 - 3036

-----X
JOSE ADAMES

INDEX.

PETITIONER

MOTION FOR

VS.

DISCLOSURE

N.Y.C. BOARD OF ELECTION

RESPONDENT
-----X

3101. ARTICLE 31. DISCLOSURE.

R.3120. Discovery and Productions of documents...

DESIGNATION PETITIONS RULES

D. DETERMINATION; CURES

PURSUANT 6-134(2) OF THE ELECTION LAW

**DI. Within two (2) business days of the receipt of a
petition, the board will review the petition to determine
whether the petition complies with the cover sheet and
bidding requirements of these Rules.**

The petitions were filed on July 16, 2009; and the Board's General Counsel, Mr. Steven Richman, send his letter of determination to cure on July 21, 2009; five days latter; it was completely out of time; failing to his own Rules.

Because of the previous and all the issuess raised at the OSC, we respectfully move this court to dismiss the entire prejudice action of the Board's General Counsel.


1. To and order to restore Jose Adames to the ballot for the Primary of September 2009.

2. To cover all court expenses, and further relief as the court consider just and proper.

Dated : *September 06* 2009

New York, N.Y.

Respectfully Submitted:



Jose Adames

641 West. 207 St. 1A N.Y. N.Y. 10034

(718) 825 - 3036

Conspiracy at the New York City Board of Elections.

The Rules B. Identification Numbers (ID); From The Designating Petitions Rules; B1, said: " No one is require to apply for a petition volume identification number before filing any petition volume ".

Further down, B5, said : ..." The Board will assign a petition volume ID, at the time the petition volume is filed ". Exhibit -C

As the rules allow, I filed my petitions to run for New York City mayor; with a separate Cover Sheet, without the ID.

But, the Board's General Counsel, Mr. Steven Richman, decided not to follow the rules, but, to play his own game.

In 2005, Mr. Richman, in a very prejudice and malicious way, got somebody to challenge my petitions and did got me out of the ballot, because of a very frivoulous claim; (" one " number was written with ink instead of printing), the objector never showed in court to substantiate his objections; but, I was never allowed to return to the ballot.

As appeared, this year, Mr. Richman didn't got an objector, and decided to take me out of the ballot by himself.

The cover Sheet, as is called, is part of the volume, but, is mandated, to be filed separated from the volume; both together conform The Petition.

Mr. Richman decided to put the ID," only " in the volume, but, not in the

Covert Sheet; sending me a letter saying that, the ID, number does not appear in the Covert Sheet, and gave me Three days to cure.

Knowing the malicious action from the pass from Mr. Richman; I traveled to the Board, and got as ID number from the Petitions room, the ID No. 796, the individual encharged of receiving the copies orders, got the number from the computer, after I gave him my name.

Further down, I went to the Candidate Unit, and the clerk confirmed the number, Mr. *Michael Mussia* He said the ID number number is 796, after he again checked in the computer. The number is the same as appear in the candidate list, that I got from them, Exhibit -F; then, I porceed to write the number in the Amended Covert Sheet, and filed at the Board, Exhibit-D, together with a copy of the original Cover Sheet, as sugested in some part of the Rules. Exhibit-E

But, the bad intention of Mr. Richman, were clear; he is using his positon to sell political favors to others; and on July 27, he send me the letter Exhibit-G, saying that I was out of the ballot, because of a supposed non compliance.

The letter has a problem by itself, and it is that, it was signed by a supposed commissioner that, do not appear in the list of commissioners, the first name look like " Diana " but, there is no name like that, in the list of commissioners. Nothing that started with the letter " D " as shown in the heading of the letter.

As appeared, Mr. Richman got his own private commissioner to get his letters signed.

I forgot to mention this at the Commissioners hearing, because I virtually had to jump from my seat, in order to be heard.

Mr. Richman, who is encharged with the calendar call, apparently didn't even included me, in the calendar. At the end, and after collecting all his papers, he said " Commissioners that was the last case in city wide matters " and statrted to get up to leave.

If I don't get up, quick; it would have been the end, without calling me.

As appear, not even the commissioners got a copy of the calendar, despite that; at the beginning of the section, I requested for a copy of the calendar.

Knowing that Mr. Richman used the same trick, to hide my case, among many other illegalities.

There was not calendar available and the section started without one; in a perfect fashion for the " malice game " of Mr. Richman, to take place. He was the only one knowing the calendar.

I remember that the Board used to hand out a copies of the hearings calendar, but, as he did it in 2005, this year, the calendar was hided.

After the commissioners accepted to look at my case, he didn't even asked for excuse.

The commissioner took a look at the evidences that I brought,

supposededly Mr. Richman himself, forgot his own, after some argument, the case was postponed for the afternoon, because, they wanted to to check my petitions.

In the afternoon, the case didn't started until the petitions were found; as it look, the commissioners wanted to take a look a them, with the intention to see if they colud find something else that could disqualify me.

They check the petitons, but, nothing was found; and the president, in a rebutal said " I guess we have to submitted to the vote, and called by acclamation; one by one; where the big majority virtually said " I " I din't heard anybody saying " no "; appeared unanimous.

But, supposedly, Mr. Richman got confused with the count, and requested to call for a vote again, but, he asked the president Mr. Fred Umane, to do it by the rol; and he himself started calling the commissioners names.

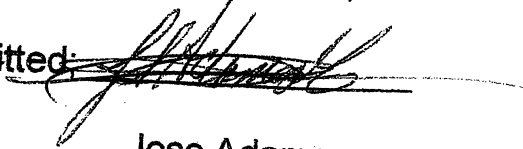
This time, six commissioners in a row, changed and answered " abstain " one said " no " I didn't heard the president vote. Neither I heard the eighth vote.

The fact was that, at second call, six commissioners abstain, it just mean that, when called personally, one by one; under Mr. Richman prssure, maybe they didn't want to contradict Mr. Richman's conspiracy; in the bottom, there was a " yes " that they previously sounded, one by one.

Wherefore, form all of the above, and the evidences submitted; we

respectfully move this court for an order to restore the candidacy of Jose
Adames to the ballot for the Primary Elections of September 15, 2009.

Respectfully submitted:



Jose Adames

P.O.Box 22 Inwood Station

New York, N.Y. 10034

(646) 374 - 7753

(718) 825 - 3036

*Dated: September 01, 2009
New York, N.Y. 10034*

A
D

Mr. Frederic Umame
Commissioner
Board Of Elections of the City of New York
Executive Office, 42 Broadway
New York, NY 10004-1609

Dear Mr. Umame

Corrected 8/27/09
Amendment 1 {1791}
Redress of Grievance

Dear Sir:

Thank you for allowing me to bring through this venue Mr. José Adames Tapia case for the re evaluation of the facts in his application to be admitted in the NYC Board Of Election Ballot Petition aimed to include Mr. Adames Tapia for public service employee candidate for Mayor of the City of New York.

By right, the Board of Election voted in his favor during the BOE hearing of Monday August 3rd, 2009 as the enclosed document from the BOE attests, and later on, was unlawfully removed by a member of the Board named Steven Richman according to Mr. Adames testimony.

The illegitimate removal of his candidacy from the ballot by a Board member has kept Mr. Adames out of the race for a whole month bringing hardship to his candidacy.

I attended the hearing at 42 Broadway, Board Of Election on August 25th, 2009 and was appalled at the mockery and blatant abridgement of the civil and constitutional rights of a citizen of this great Nation like Mr. Adames and his long time companion and prestigious community leader and author Mrs. Nilda Resach, where they fruitlessly attempted to speak in a public assembly of the people, with the intent to claim his legal right to enter in a lawful race; with the objective to be a public servant of the people of the State of New York.

The propriety and virtuosity of a body of law to watch for the honorability and fairness of the election process, one of the most sacred pillars of our democratic system was prostituted, dishonored and debased because the man that claims his duty act is from the Country of Santo Domingo.

In affirmation to Mr. Adames candidacy, Mr. José Adames Tapia, I allege and state, that to the best of my knowledge, and in accordance to the enclosed evidence, that substantiate his testimonies and allegations, he has not defaulted in any way the Board Of Elections of the City of New York proceedings, rules and Laws that policy the Mayor's candidacy, while members from this honorable Board, meanwhile provided fallacies and innuendo during all this duty claim.

After a careful consideration of the facts, and documents, I base my contention and petition for your reconsideration, which at least had a good will during this political 'massacre', on the Constitution of the United States of America and the NY State Board of Election Law.

A. Article IV, Section 1. Full Faith and credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and proceeding shall be proved, and the effect thereof.

Section 2 [1] The citizen of each State shall be entitled to all privileges and Immunities of Citizens in the several States

B. Articles in addition to, and amendment of, the constitution of the United States of America, proposed by Congress, and ratified by the legislatures of the several states pursuant to the fifth Article of the original Constitution.

1. Amendment 1 [1791] Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Amendment XIV [1868]

Section: 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

C. New York state Board of Elections Rules, Regulations and Law
New York State §6215.6 .proceeding and
§ 6215. Notice to Cure C § ~~62-15.7~~

The issue:

Mr. Adames complied with New York State §6215.6 Section (a)

(b).proceeding.

Why the BOE sent a Notice to Cure Section §6215. 7-134(2) alleging a violation of New York State §6215.6 Section (a) (b) of the Election Law when he did complied with those rules.

The question:

Is that notice to Cure according to §6215.7 Section 6-134(2) of the Election Law wrongfully mailed to Mr. Adames, a human err; an act of ignorance of the Law, a misinterpretation of the Law, or an attempt to intentionally deprive and abridge Mr. Adames's civil and constitutional rights; or is an elaborated entrapment defecting the process of law by corrupt and fraudulent means to make him stumble on default and untimeliness, therefore delaying his entrance to the race as a candidate to public office official.?

By right it is his constitutional privilege and opportunity as citizen to exercise his constitutional rights to speech and to assemble and pursuit the right to happiness and to run for public office if he complies with the appropriate required legal statutes accordingly.

Is this Notice to Cure an intentional act to force him to waste his time and resources to enter the race for Mayor defending himself, by dumping him into the labyrinth of the law to purposely delay his entering in the race so he cannot make it on time?

Is it an act of bigotry because he is of different cultural background?

Is this a misconception of the timing and, interpretation of the law, why the Board of Election lawyers alleged fallacy?

Evidence:

Herewith I present my allegations and affirmations with substantiation of evidence that prove that Mr. Adames complied with the BOE Law and requirements and that this Honorable Body that you preside should vacate your opposition against Mr. Adames and restore him to the Ballot according to the afore mentioned jurisprudence, facts and evidence..

1. Filed a Candidacy Petition on : July 16,2009
2. On July 21st A Notice to Cure was issued by the Board of Election claiming no compliance of New York State BOE Law §6215.6 Section (a) (b) claiming that he did not file an identification Number(s) on the cover Sheet.

Even when **he did not have to comply with an identification number according to BOE Law** and he did not fault in that rule according to the BOE Law by providing such number ; Rule §6215.6, (b), he timely complied with the Notice to Cure within the three days request(**EXHIBIT C**).

- The Law: 6215-6 (a) (b) Construction of rules: substantial compliance
- (a) Except as specifically set forth herein, these rules shall be liberally construed and technical defects shall be disregard for there has been substantial compliance and where strict construction is not required for the prevention of fraud.
 - (b) **The failure to obtain an identification number or inscribe an identification number on one or more**

**petitions or petition volumes, shall not render any
such petition or petition volumes invalid**

Notice that the letter to Cure is issued on the 21st of July, 2009 and that he complied personally as requested on July 23rd, 2009. **(Stamped by the Board Of Election –attesting that the Cure was received on July 23rd, 2009 at 9:09 a.m.)**

On Monday, August 3rd. The BOE voted in favor of Mr. Adames inclusion in the Ballot as follows:

3 in favor

1 against

6 abstentions

(Exhibit D)

On the 3rd of August, an affirmative voting by the BOE in favor of Mr. Adames was ignored by a member of the BOE, Mr. Steven Richman, and like a loose cannon, removed Mr. Adames from the Ballot in an arbitrary and illegal manner in defiance of the Board's decision and the Law.

The next day, Mr. Adames inquired about the matter and was informed by the Campaign Finance Board on August 4th that Mr. Adames was excluded from the Ballot.

On August 5th, (see Exhibit E.) Mr. Adames presented his objection to the Supreme Court within the legal time limit of three days according to the status of limitation, with an O.S.C. where the Board of election presented a unlawful oral argument alleging that Mr. Adames petition to the Supreme Court was untimely when the BOE Law requires 3 days to present any appeal from the BOE to the Court of Jurisdiction. (Exhibit E) shows that the O.S.C. requesting to Vacate Mr. Steven Richman decision to remove Mr. Adames as candidate for Mayor was filed within the 3 days limit.

It is not understandable why the Court errs so grievously against the rule of Law except that the BOE lawyers misconstrued the facts and dates and rules of Law alleging a fallacy in front of a referee of the Court therefore bringing irreparable damages to the credentials and reputation of Mr. Adames. Later on, this "decision of untimely appeal" was ratified by a Judge that apparently took for granted the referee's decision without inquiring the BOE Law and ignoring the enclosed evidence submitted to him.

This travesty of Law can still be rectified by your careful reconsideration of the enclosed facts.

It seems to me that the invalidated Ballot Petition was an act of defiance of the Law § 6215'6 (b) and BOE Law and a breach of civil and constitutional laws,
as well as AN ABUSE OF POWER.

Let the people decide if they want Mr. Adames Tapia as a Mayor, let him be and fulfill his American dream because by right, he is entitled to be in that Ballot. To alter the facts in order to judge and condemn is unlawful.

It is the right of the People to judge and select, and vote, because ultimately, this is a Government of the People, for the People and by the People, as Mr. Lincoln so very well pronounced in the Gettysburg Address.

I am respectfully requesting that you grant this petition of reconsideration, because you have the jurisdiction to do so; and to restore Mr. José Adames to the Ballot Petition.

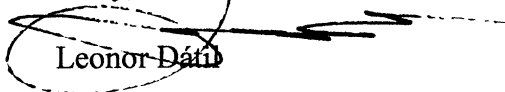
Is not better to let him be in his sacred quest as the Lord commands than to breach the law?

Let the people decide. It is the people who have also been dispossessed of the right to choose and elect and to be exposed to what Mr. Adames has the right to say for the commonwealth of the many. The people and the Constitution have also been desecrated with this contempt of the Law that Mr. Adames has endured for so long.

Therefore, in the event that you do not respond within the next 72 hours upon delivery of this letter, Mr. José Adames Tapia does not have any other remedy at law than to proceed with an Order to Show Cause, T.R.O and Law Suit in the Federal Court, Southern District of Manhattan against the City of New York for irreparable damages and abridgement to his constitutional and civil rights.

Today, August the 26th, 2009.

Truly,


Leonor Dátib

P.O. Box 1909 Canal Street Sta. New York, N.Y 10013-0881

Exhibit-1

Pet #	Group #	Name	Address
-------	---------	------	---------

Mayor - Citywide

796		Jose Adames	641 West 207 Street 1 A New York, NY 10034
481		Tony Avella	154-28 24th Avenue Whitestone, NY 11357
764		Jimmy McMillan	1996 Nostrand Ave Brooklyn, NY 11210
693		Roland Rogers	423 West 146 Street 7A New York, NY 10031
181		William C Thompson Jr.	106 West 121 Street New York, NY 10027

Public Advocate - Citywide

181		Bill de Blasio	442 11 St Brooklyn, NY 11215
101		Eric N Gioia	39-41 49 Street Sunnyside, NY 11104
		Mark Green	43 East 19 Street New York, NY 10010
		Norman Siegel	115 Central Park West 8L New York, NY 10026
		Intiaz S Syed	721 13th Avenue Brooklyn, NY 11228



FREDERIC M. UMANE
PRESIDENT

JULIE DENT
SECRETARY

JOSE MIGUEL ARAUJO
JUAN CARLOS "J.C." POLANCO
JAMES J. SAMPAL
NANCY MOTTOLA-SCHACHER
NAOMI C. SILIE
J.P. SIPP
GREGORY C. SOUMAS
JUDITH D. STUPP
COMMISSIONERS

BOARD OF ELECTIONS

IN
THE CITY OF NEW YORK
EXECUTIVE OFFICE, 32 BROADWAY
NEW YORK, NY 10004-1609
(212) 487-5300
www.vote.nyc.ny.us

MARCUS CEDERQVIST
EXECUTIVE DIRECTOR

GEORGE GONZALEZ
DEPUTY EXECUTIVE DIRECTOR

PAMELA GREEN PERKINS
ADMINISTRATIVE MANAGER

STEVEN H. RICHMAN
GENERAL COUNSEL
Tel: (212) 487-5338
Fax: (212) 487-5342
E-Mail:
srichman@boe.nyc.ny.us

July 21, 2009

Jose Adames
641 West 207 Street #1A
New York, New York 10034

Exhibit 2

Candidate's Name: Jose Adames

Party: Democratc

Office: Mayor of the City of New York

Dear Sir:

Please be advised that your cover sheet fails to comply with the New York State Board of Elections Regulations, 9NYCRR §6215, or this Board's Rules for Designating/Opportunity to Ballot Petitions adopted on March 24, 2009, for the following reason(s):

- ~ 1. No cover sheet filed.
- ~ 2. Cover sheet attached to petition.
- ~ 3. Name of Party omitted from cover sheet.
- ~ 4. Number of volumes omitted from cover sheet.
- ~ 5. Number of volumes filed doesn't agree with claimed identification numbers on cover sheet.
- ~ **6. No identification number(s) claimed on cover sheet.**
- ~ 7. Incorrect identification number(s) on cover sheet.
- ~ 8. Cover sheet omits statement claiming valid signatures in petition.
- ~ 9. Candidate name omitted from cover sheet.
- ~ 10. Candidate address omitted from cover sheet.
- ~ 11. Office and/or district omitted from cover sheet.

Exhibit-2A

12. Amended cover sheet is not certified.
13. County committee schedule omitted.
14. County committee schedule does not conform to regulations.
15. Some candidates for county committee have no page numbers on the schedule. Those candidates are removed unless the defect is cured.
16. Other:

This defect may be cured within three business days of the date of this letter by the filing of an amended cover sheet. Amended cover sheets must be **filed in person only** at the Executive Office, 32 Broadway, 7th Floor, Borough of Manhattan, New York.

Failure to file the amended cover sheet within the three day period shall be a **FATAL DEFECT**.

Very Truly Yours,

THE COMMISSIONERS OF ELECTIONS
IN THE CITY OF NEW YORK

By: 

Exhibit-3

AMENDED COVER SHEET

**DEMOCRATIC PARTY
DESIGNATING PETITION - NEW YORK COUNTY**

Candidate Name	Public Office	ADDRESS
Jose Adames	Mayor of the City of New York	641 W. 207 ST. # 1A NEW YORK, N.Y. 10034

Total Number of Volumes in Petition 1

Identification Numbers 796

The petition contains the number, or in excess of the number, of valid signatures required by the Election Law.

Contact Person to Correct Deficiencies:

Name: Jose Adames
(please print)

Residence Address: 641 West 207 street #1A
New York, N.Y. 10034

Phone: 646-374-7753 Fax: 718-825-3036

RECEIVED
G.O. BD. OF ELECTIONS
IN THE CITY OF NEW YORK
2009 JUL 23 A 9:09

I hereby authorize that notice of any determination made by the Board of Elections be transmitted to the person named above:

Jose Adames
Candidate or Agent

"This is to certify that I am authorized to file this amended cover sheet."

Jose Adames 7-23-09 [Signature] Signature
Date



COVER SHEET

Exhibit-3A

**DEMOCRATIC PARTY
DESIGNATING PETITION — NEW YORK COUNTY**

Candidates Names	Public Office	ADDRESS
Jose Adames	Mayor of the City of New York	641 W. 207 ST. # 1A NEW YORK, N.Y. 10034

Total Number of Volumes In Petition 1 Vol. 1 796

Identification Numbers

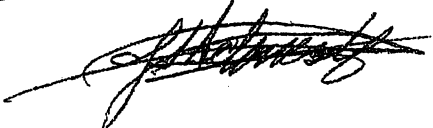
The petition contains the number, or in excess of the number, of valid signatures required by the Election Law.

Contact Person to Correct Deficiencies :

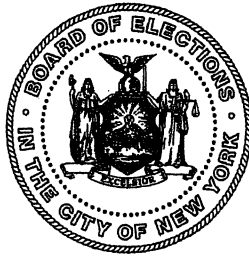
Name : Jose Adames
Residence : 641 West 207 Street # 1A
New York, N.Y. 10034

Phone 718) 825 - 3036 Fax: (718) 825 - 3036

Candidate / Contact person : Jose Adames



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IN THE CITY OF NEW YORK
2009 JUL 16 P 11:51



FREDERIC M. UMANE
PRESIDENT

JULIE DENT
SECRETARY

JOSE MIGUEL ARAUJO
JUAN CARLOS "J.C." POLANCO
JAMES J. SAMPAL
NANCY MOTTOLA-SCHACHER
NAOMI C. SILIE
J.P. SIPP
GREGORY C. SOUMAS
JUDITH D. STUPP
COMMISSIONERS

BOARD OF ELECTIONS

IN
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ADMINISTRATIVE MANAGER

STEVEN H. RICHMAN
GENERAL COUNSEL
Tel: (212) 487-5338
Fax: (212) 487-5342
E-Mail:
srichman@boe.nyc.ny.us

Exhibit 4

July 27, 2009

Jose Adames
(Candidate/Contact Person)

Dear Sir:

The Commissioners of Elections (or duly constituted committee thereof), pursuant to the provisions of **Rule D6** of the Board's Designating Petition Rules for the September 15, 2009 Primary Election, at a meeting held on July 23, 2009, determined that the following **will not appear on the ballot** for the **September 15, 2009 Primary Election** since the **Amended Cover Sheet** filed **did not comply** with the New York State Election Law and/or the Rules of the Board of Elections, in that:

the petition volume identification number claimed on the amended cover sheet is not a valid identification number.

NAME	OFFICE/POSITION	PARTY
Jose Adames	Mayor of the City of New York	Democratic

Very Truly Yours,

THE COMMISSIONERS OF ELECTIONS
IN THE CITY OF NEW YORK

By: 

EXTREME RACISM

EVERYBODY SAY, THE YES, WON

THE CONTROLLED BOARD OF ELECTIONS SAID NO

ROLL CALL Exhibit-5

Monday, August 3, 2009

SPEC. #: By Umane + Stupp

MOTION: TO VACATE C.S. Committee
determine relaty to Jose Adames f Mayor/Dem

COMMISSIONER:

	YES	NO	ABSTAIN
Pres. Umane	<u>YES</u>	NO	ABSTAIN
Sec. Dent	YES	NO	<u>ABSTAIN</u>
Araujo	YES	NO	<u>ABSTAIN</u>
Polanco	YES	NO	<u>ABSTAIN</u>
Sampel	YES	NO	<u>ABSTAIN</u>
Schacher	YES	NO	<u>ABSTAIN</u>
Silie	YES	NO	<u>ABSTAIN</u>
Sipp	<u>YES</u>	NO	ABSTAIN
Soumas	YES	<u>NO</u>	ABSTAIN
STUPP	<u>YES</u>	NO	ABSTAIN
TOTAL:	<u>3</u>	<u>1</u>	<u>6</u>

**ADAMES, CANDIDATE FOR MAYOR,
THE ONLY HISPANIC CANDIDATE FOR MAYOR 99
STILL NOT IN THE BALLOT**

[Print in black ink all areas in bold letters. Other spaces are for Court use.]

At I.A.S. Part _____ of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, thereof, 60 Centre Street, New York, N.Y., on the _____ day of _____, 200__

Exhibit-6

PRESENT: HON. SHERRY KLEIN HETLER
Justice of the Supreme Court

Index Number

0911229/09

In the Matter of the Application of

JOSE Adames
[fill in name(s)] Petitioner(s)

ORDER TO SHOW CAUSE
IN SPECIAL PROCEEDING

- against -

NYC Board of Election
[fill in name(s)] Respondent(s)

RECEIVED
G.O. BO. OF ELECTIONS
IN THE CITY OF NEW YORK
2009 AUG - 6 P 5:53

Upon reading and filing the petition(s) of JOSE Adames
[your name(s)], sworn to on August 4, 2009

[date Verified Petition notarized] and upon the exhibits attached to the petition,

[Identify Exhibits below. List additional Exhibits on separate page.]

Exhibit A - is The final and illegal decision from the Board of Elections To Keep Jose Adames Out Of The ballot of The primary elections of September 9, 2009, without reason.
Exhibits B, C, D, E, F and G

Let the respondent(s) show cause at I.A.S. Part _____, Room _____, of this Court, to be held at the Courthouse, 60 Centre Street, New York, N.Y., on the _____ day of _____, 200 __, at _____ o'clock in the _____ noon or as soon as the parties

to this proceeding may be heard why an order should not be made, providing the following relief:
[briefly describe what you are asking the Court to do] to restore JOSE

ADAMES To the ballot for the primary elections of

Exhibit-7

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HOWARD G. LEVENTHAL**
SPECIAL REFEREE

646-386 PART *19*

Jose Adams

- v -

myc Bd. of Electors

3030

INDEX NO.

11228/09

MOTION DATE

AUG 10 2009

MOTION SEQ. NO.

801

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ reference is disposed of

in accordance with accompanying Referee's Decision, Report and Recommendation.

An appropriate motion should be made in accordance with CPLR 4403.

[Signature]

Dated: *AUG 10 2009*

HOWARD G. LEVENTHAL
SPECIAL REFEREE

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

Exhibit-7

101

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Exhibit-7A

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 83R**

In the Matter of the Application of

JOSE ADAMES,

Petitioner,

- against -

NYC BOARD OF ELECTIONS,

Respondent.

Index No. 111228/2009

Seq. 001

REFEREE'S REPORT

By oral direction of Hon. Edward Lehner, IAS Part 19, dated August 10, 2009, the issues raised in this proceeding to restore petitioner, **Jose Adames**, to the ballot for the Democratic Party primary election to be held on September 15, 2009 for the public office of Mayor of the City of New York, , were referred to the undersigned Special Referee to hear and report with recommendations.

The matter came before the undersigned on August 10, 2009. Petitioner appeared pro se. Respondent appeared by counsel as follows:

Petitioner, pro se

**Jose Adames,
641 West 207th Street apt. 1A
New York, NY 10034**

**Tel. No. 718-825-3036
646-374-7753**

Respondent (Board of Elections)

**Stephen Kitzing, Esq.
NYC Law Dept.
100 Church St. Room 2126
New York, NY 10007-2601
212-788-0849
Skitzinger@law.nyc.gov**

**Steven Richman, Esq.
NYC Board of Elections
32 Broadway, 7th Floor
New York, NY 10004-1609
212-487-5338
Srichman@boe.nyc.ny.us**

Exhibit-7A

Exhibit 7B

Petitioner submitted his Verified Petition and the exhibits thereto, and orally argued his contentions on the record. Respondent's counsel did not submit any papers, but orally argued in opposition thereto.

Election Law § 16-116 requires that a special proceeding under this article shall be heard upon a verified petition *and such oral or written proof as may be offered*, and upon such notice to such officers, persons or committees as the court or justice shall direct, and shall be summarily determined (Emphasis added).

Election Law § 16-102 (2) requires, in relevant part, that “[a] proceeding with respect to a petition shall be instituted within fourteen days after the last day to file the petition, or within three business days after the officer or board with whom or which such petition was filed, makes a determination of invalidity with respect to such petition, whichever is later” Pursuant to this year's election calendar, the last date to commence a judicial proceeding with respect to a designating petition was Thursday, July 30, 2009. This proceeding was commenced by the filing of an Order to Show Cause (OSC), signed by Hon. Sherry Klein Heitler, Ex Parte Part, on August 6, 2009, and Verified Petition, dated August 6, 2009. The OSC was returnable on August 10, 2009.

By letter dated July 21, 2009, the Board notified petitioner that his cover sheet failed to comply with its rules and regulations for the following reason:

No identification number(s) claimed on cover sheet.

The letter further stated that: “Failure to file an amended cover sheet within the three day period shall be a **FATAL DEFECT.**” On July 23, 2009 (i.e., within the three-day period), petitioner filed an amended cover sheet, bearing Identification Number 796, which number had

been assigned by the Board to his designating petitions. By letter dated July 27, 2009, the Commissioners of the Board determined that petitioner's amended cover sheet **did not** comply with the New York State Election Law and/or Rules of the Board of Elections, in that: **the petition volume identification number claimed on the amended cover sheet is not a valid identification number.**

Petitioner sought reargument or reconsideration by the Board. On Monday, August 3, 2009, on a motion to vacate the determination, the commissioners voted Yes 3; No 1; Abstain 6. It appears that under respondent's rules, a majority vote of *all* of the Commissioners (not merely of those voting) is required in order to vacate a determination. Therefore, the determination disallowing petitioner's designating petitions based upon the alleged noncompliance of the cover sheet stood. As previously noted, this proceeding was commenced on August 6, 2009.

Based upon the oral arguments by respondent's counsel, it appears that the alleged deficiency in the petition volume identification number placed on petitioner's amended cover sheet was that it was only three digits long and failed to identify the county where filed, i.e. New York County. Respondent's counsel argued that theoretically there could be up to five volumes bearing the petition identification number 796, one for each borough, and, in fact, there was another cover sheet number 796 filed in Queens County, QN0-00796, assigned to Daniel Dromm, a candidate seeking the nomination by the Working Families Party for the office of member of the City Council- 25th CD.

As a noted commentator has written:

The Board of Elections may disqualify a candidacy *if the error is material*, and the candidate will have to ask a court for relief. Obviously, extreme care should be taken by the candidates when

submitting the Cover Sheet and/or the Amended Cover Sheet.

Jerry H. Goldfeder, *Goldfeder's Modern Election Law* at 44 *et seq.* [1st ed 2007] [emphasis added]]

In Magelaner v Park, (32 AD3d 487 [2nd Dept 2006]), the Appellate Division, Second Department, held as follows:

Terence Y. Park's amended cover sheet was in substantial compliance with the Election Law and the rules promulgated by the Board of Elections of the City of New York (hereinafter the Board) and presented no danger of fraud or confusion either to the Board or to the voters (see Election Law § 6-134[10]; 9 NYCRR 6215.6[a]; Matter of Pearse v New York City Board of Elections, 10 AD3d 461, 462; Matter of Siems v. Lite, 307 A.D.2d 1016; Matter of Most v. Walker, 297 A.D.2d 356, 357; Matter of Jonas v. Black, 104 A.D.2d 466, *affd* 63 N.Y.2d 685). As a result, the Supreme Court erred in granting the petition to invalidate the designating petition (see 9 NYCRR 6215.7[d]) and in denying the petition to validate the designating petition (see Matter of Pearse v New York City Bd. of Elections, 10 AD3d at 462).

In the absence of relevant Appellate Division, First Department, authority, this court must follow the determination of the Appellate Division, Second Department (People v Shakur, 215AD2d 184, 185 [1st Dept 1995]).

A strict adherence to the amended cover sheet rules would run afoul of the spirit behind the Election Reform Act of 1992, to “make it easier for alternative candidates to emerge, so that voters have a wider choice from which to select” (Governor’s Mem. of Approval, 1992 McKinney’s Session Laws of N.Y., at 2877). As Professor Goldfeder noted:

In both 1992 and 1996, the Legislature determined to undo the draconian effect that the Election Law, and its strict judicial constructions, had had in unfairly eliminating candidates from securing a place on the ballot. By eliminating a myriad of technicalities that have long been used to invalidate petitions and signatures for reasons having nothing to do with whether a signatory of a petition was qualified to do so, this legislation will help ensure

that all our citizens have a fair opportunity to obtain access to the ballot. ... By making the process of running for elective office easier and fairer, we honor that tenet and return government to the people.

(Governor's Mem. of Approval, 1996 McKinney's Session Laws of N.Y., at 1939).

Applying the foregoing to the instant proceeding, I find that petitioner's amended cover sheet was in substantial compliance with respondent's rules and that there was no danger of fraud or confusion either to the Board or to the voters, and that the Board's hypertechnical application of its rules to petitioner's amended cover sheet is precisely the type of conduct which the Election Reform Acts of 1992 and 1996 intended to prevent.

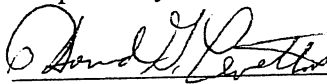
However, it has long been the law that a mere request for reconsideration of an adverse decision and the denial thereof, does not extend the statute of limitations (*Davis v Kingsbury*, 27 NY2d 567 [1970]; Howard G. Leventhal, 1 Byer's Civil Motions § 8:28 at 125 [2nd rev ed 2006]). Respondent preserved and orally made a motion to dismiss the petition on the ground that this proceeding was not commenced in a timely manner. Respondent has met its burden of proof as to the merit of its affirmative defense (CPLR 404 [a]). The fact that petitioner is appearing pro se does not entitle him to greater right than any other litigant and such appearance may not be used to deprive defendants of the same rights enjoyed by other defendants (*Roundtree v. Singh*, 143 AD2d 995, 996 [2d Dept 1988]).

Accordingly, it is my recommendation that the court grant respondent's motion to dismiss this proceeding on the ground that it is untimely, and that the application of petitioner to be placed on the ballot for the Democratic Party primary election to be held on September 15, 2009 for the public office of Mayor of the City of New York, be denied, and that the court confirm the Referee's report, and that judgment be entered accordingly.

This shall constitute the decision, report and recommendation of the Special Referee.

DATED: August 10, 2009

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Howard G. Leventhal", is written over a horizontal line.

Howard G. Leventhal,
Special Referee

Exhibit F

PRESENT: EDWARD H. LEHNER
Justice

PART 19

Jose Adames

INDEX NO. 11/228/09

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -
NYC Board of Elections

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion petition is denied for
the petitioner's failure to appear at oral
argument.

NYS SUPREME COURT
RECEIVED
AUG 13 2009
IAS MOTION
SUPPORT OFFICE

FILED
AUG 14 2009
COUNTY CLERK'S OFFICE
NEW YORK

AUG 12 2009

Dated: _____

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

COSP Exhibit 8

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

§6215.6

Construction of rules: substantial compliance

(a) Except as specifically set forth herein, these rules shall be liberally construed and technical defects shall be disregarded where there has been substantial compliance and where a strict construction is not required for the prevention of fraud.

(b) The failure to obtain an identification number or inscribe an identification number on one or more petitions or petition volumes shall not render any such petition or petition volume invalid. The officer or Board receiving such petition or petition volume shall assign identification numbers to such petition or petition volumes, shall inscribe the identification number upon the petition or volume, and shall record the identification number of such petition or volume. In such instances, the person or persons submitting the petition or petition volume for filing shall be deemed to be the applicant for the identification number, or in the event the persons submitting the petition or petition volume, cannot be identified, the candidates named on the petition or petition volume shall be deemed to be the applicant or applicants.

§6215.7

Determinations: cures pursuant to Section 6-134(2) of the Election Law

(a) Within two (2) business days of the receipt of the petition, the Board with whom such petition was filed shall review the petition to determine whether the petition complies with the cover sheet and binding requirements of these regulations. Such review shall be limited to matters apparent on the face of the documents. Such review, and such determination, shall be without prejudice to the determination by the Board of objections and specifications of objections filed pursuant to the provisions of the Election Law.

(b) In the event that, upon the review conducted pursuant to paragraph (a) above, the Board determines that a petition does not comply with these regulations, the Board shall forthwith notify the candidate or candidates named on the petition of its determination and the reasons therefor.

Exhibit-9

208e Adams 718-825-3036



Board of Elections

in the City of New York
200 Varick Street
New York, N.Y., 10014
(212) 606-2100
Direct fax number (646) 638-2047

Fax

To: Commissioner Fred Young From: Lawrence J. Capici
 Fax: _____ Pages: 22
 Phone: _____ Date: 8/27/09
 Re: José Adam's Tapia CC: _____

Urgent For Review Please Comment Please Reply Please Recycle

• Comments:

NOTE: This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential, and exempt from disclosure under applicable law. If the reader of this message is NOT the intended recipient, or the employee or agent responsible for delivering the message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return the original message to us at the above address via the United States Postal Service.

Exhibit-10

Fax/Phone Number	Mode	Start	Time	Page	Result	Note
S011 COMM.UMANE	NORMAL	27,16:48	4'40"	22	# 0 K	

Aug 27 2009 16:48

P.1

** Transmit Conf. Report **

Fax: 646-638-2047

BD OF ELECTIONS

Comm m/h
Fy7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

BROTHER T. WILLIAMS BEY, NIYYIRRAH EL,
LINCOLN SALMON, JUAN ANTONIO MARTINEZ,
SR., S. JUAN ANTONIO MARTINEZ, JR., SONYA
SIMMONS, JOYCE NIX, *et al.*,

NOTICE OF MOTION

Plaintiffs, 09 CV 7560 (DLC)

- against -

THE COMMISSIONERS OF ELECTIONS
CONSTITUTING THE BOARD OF ELECTIONS IN
THE CITY OF NEW YORK,

Defendants.

----- x

PLEASE TAKE NOTICE, that upon the Defendant's Memorandum of Law in Support of Its Motion to Dismiss the Complaint, and all other pleadings and proceedings herein, defendant Board of Elections in the City of New York, will move this Court on a date and time to be designated by the Court, before the Honorable Denise Cote, United States District Judge, at the United States Courthouse for the Southern District of New York, 500 Pearl Street, New York, New York 10007, for an order pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure, dismissing the complaint and for such other relief as the Court deems just and proper.

**NOTICE TO PRO SE LITIGANT WHO
OPPOSES A RULE 12 MOTION SUPPORTED
BY MATTERS OUTSIDE THE PLEADINGS**

The defendant in this case has moved to dismiss for judgment on the pleadings pursuant to Rule 12(b) or 12(c) of the Federal Rules of Civil Procedure and has submitted additional written materials. This means that the defendant has asked the court to decide this case without a trial, based on these written materials. You are warned that the Court may treat this motion as a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. For this reason, **THE CLAIMS YOU ASSERT IN YOUR COMPLAINT MAY BE DISMISSED WITHOUT A TRIAL IF YOU DO NOT RESPOND TO THIS MOTION** by filing sworn affidavits and other papers as required by Rule 56(e). An affidavit is a sworn statement of fact based on personal knowledge that would be admissible in evidence at trial. The full text of Rule 56 of the Federal Rules of Civil Procedure is attached.

In short, Rule 56 provides that you may NOT oppose the defendant's motion simply by relying upon the allegations in your complaint. Rather, you must submit evidence, such as witness statements or documents, countering the facts asserted by the defendant and raising issues of fact for trial. Any witness statements must be in the form of affidavits. You may submit your own affidavit and/or the affidavit of others. You may submit affidavits that were prepared specifically in response to defendant's motion.

If you do not respond to the motion on time with affidavits or documentary evidence contradicting the facts asserted by the defendant, the court may accept defendant's factual assertions as true. Judgment may then be entered in defendant's favor without a trial.

If you have any questions, you may direct them to the Pro Se Office.

Dated: New York, New York
September 2, 2009

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for Defendant Board of
Elections in the City of New York
100 Church Street, Room 2-126
New York, New York 10007
(212) 788-0849
e-mail: SKitzing@law.nyc.gov

By: s/Stephen Kitzinger
Stephen Kitzinger
Assistant Corporation Counsel

EXHIBIT A

FEDERAL RULES OF CIVIL PROCEDURE

RULE 56. Summary Judgment

(a) By a Claiming Party. A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at any time after:

- (1) 20 days have passed from commencement of the action; or
- (2) the opposing party serves a motion for summary judgment.

(b) For Defending Party. A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.

(c) Serving the Motion; Proceedings. The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

(d) Case Not Fully Adjudicated on Motion.

(1) **Establishing Facts.** If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts--including items of damages or other relief--are not genuinely at issue. The facts so specified must be treated as established in the action.

(2) **Establishing Liability.** An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.

(e) Affidavits; Further Testimony.

(1) **In General.** A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.

(2) **Opposing Party's Obligation to Respond.** When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must--by affidavits or as otherwise provided in this rule--set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

(f) When Affidavits are Unavailable. If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) deny the motion;

(2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or

(3) issue any other just order.

(g) Affidavit Submitted in Bad Faith. If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.

CERTIFICATE OF SERVICE

I, Stephen Kitzinger, hereby certify that a copy of the attached Notice of Motion was caused to be served on the party listed below by first-class mail, postage prepaid, on September 2, 2009.

Brother T. Williams-Bey
c/o 305 E. 170th Street
Bronx, New York 10456

Niyyarra El
1685 University Avenue, #3D
Bronx, New York 10453

Juan Antonio Martinez, Sr.
Juan Antonio Martinez, Jr.
1000 Freeman Avenue
Bronx, New York 10459

Dated: New York, New York
September 2, 2009

s/Stephen Kitzinger
STEPHEN KITZINGER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

BROTHER T. WILLIAMS BEY, NIYYIRRAH EL,
LINCOLN SALMON, JUAN ANTONIO MARTINEZ,
SR., S. JUAN ANTONIO MARTINEZ, JR., SONYA
SIMMONS, JOYCE NIX, *et al.*,

Plaintiffs,

**DECLARATION OF
STEPHEN KITZINGER IN
SUPPORT OF
DEFENDANTS' MOTION TO
DISMISS THE COMPLAINT**

- against -

09 CV 7560 (DLC)

THE COMMISSIONERS OF ELECTIONS
CONSTITUTING THE BOARD OF ELECTIONS IN
THE CITY OF NEW YORK,

Defendants.

----- x

STEPHEN KITZINGER, pursuant to 28 U.S.C. § 1746, declares under penalty
of perjury, that:

1. I am an Assistant Corporation Counsel in the office of Michael A. Cardozo, Corporation Counsel of the City of New York, attorney for defendant Board of Elections in the City of New York (the "Board"). As such, I am familiar with the facts of this case.

2. I submit this declaration in support of the Board's motion, pursuant to Rule 12 of the Federal Rules of Civil Procedure, to dismiss the complaint. The complaint should be dismissed because: (1) he has not alleged a federal claim that gives this Court jurisdiction; (2) the state-law claims are time-barred, were actually unsuccessfully litigated by the putative candidates, and the plaintiffs herein have no standing to pursue such claims; (3) in the event that the Court were to construe the Complaint as asserting a claim under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States (the "Fourteenth

Amendment”), such a claim is barred by the Second Circuit’s opinion and order in *Rivera-Powell v. New York City Bd. of Elec.*, 470 F.3d 458 (2d Cir. 2006); and (4) the Board, in removing the putative candidates’ names from the ballot was acting in accordance and complying with properly issued orders of the Supreme Court of the State of New York.

3. Attached hereto as Exhibit A is a true and correct copy of the Orders of the New York State Courts, the Supreme Court, the Supreme Court, Appellate Division, and the Court of Appeals, relating to the proceedings to validate/invalidate putative candidate Israel Martinez’s petition.

Dated: New York, New York
September 2, 2009

s/Stephen Kitzing
STEPHEN KITZINGER

CERTIFICATE OF SERVICE

I, Stephen Kitzinger, hereby certify that a copy of the attached Declaration of Stephen Kitzinger in Support of Defendant's Motion to Dismiss the Complaint was caused to be served on the party listed below by first-class mail, postage prepaid, on September 2, 2009.

Brother T. Williams-Bey
c/o 305 E. 170th Street
Bronx, New York 10456

Niyyarra El
1685 University Avenue, #3D
Bronx, New York 10453

Juan Antonio Martinez, Sr.
Juan Antonio Martinez, Jr.
1000 Freeman Avenue
Bronx, New York 10459

Dated: New York, New York
September 2, 2009

s/Stephen Kitzinger
STEPHEN KITZINGER

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART OSCM PART

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

ISRAEL MARTINEZ

Index No. 260457/2009

-against-
FREDERIC M. ULIASZ

Hon. ROBERT G. SEEWALD

Justice.

The following papers numbered 1 to _____ Read on this motion,
Noticed on _____ and duly submitted as No. _____ on the Motion Calendar of _____

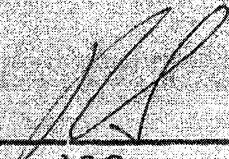
	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

Application is decided in accordance with the attached
memorandum decision.

Motion is Respectfully Referred to:
Justice _____
Dated: _____

Dated: 8/14/09

Hon. 
J.S.C.

ROBERT G. SEEWALD

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART OSCMPART

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX:

_____X

GRISELA LAZARCA

Index No. 260441/2009

-against-

Hon. ROBERT G. SEENALD

ISRAEL MARTINEZ

Justice.

_____X

The following papers numbered 1 to _____ Read on this motion,
 Noticed on _____ and duly submitted as No. _____ on the Motion Calendar of _____


	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

Application is decided in accordance with the attached
 memorandum decision.

Motion is Respectfully Referred to:	Justice: _____
	Dated: _____

Dated: 8.14.09

Hon. 
 J.S.C.

ROBERT G. SEENALD

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX**

**In the Matter of the Application of
Israel Martinez, as the aggrieved candidate for the
public office of Council Member from the 17th
Council District, Bronx County,**

Petitioner,

-against-

Index No. 260454/09

**Frederic M. Umane, Julie Dent, Jose Miguel Araujo,
Juan Carlos Polance, James J. Sampel, Nancy Mottola-
Schacher, Naomi C. Silie, J. P. Sipp, Gregory C. Soumas,
and Judith D. Stupp, being the Commissioners of the
Board of Election in the City of New York,**

-and-

**Grisela Laraja, Objector, and any other not made public
by the Board of Elections in the City of New York,**

Respondents,

**For an Order declaring VALID the nomination
Petitions of Israel Martinez Filed with respondent
Board of Election in the City of New York designating
the petitioner as candidate for the office of Council
Member, 17th District of Bronx County, Election to
be held on September 15, 2009.**

**In the Matter of the Application of
Grisela Lajara, As Objector,**

Petitioner,

-against-

Index No. 260441/09

**Israel Martinez as candidate for Council Member
From the 17th Council District and Egidio Sementilli as
the candidate's Contact person; AND**

**Frederic M. Umane, Julie Dent, Jose Miguel Araujo, Juan
Carlos Polanco, James J. Sampel, Nancy Mottola-Schacher,**

**Naomi C. Silie, J. P. Sipp, Gregory C. Soumas, and
Judith D. Stupp, Being the Commissioners of the Board of
Elections, In the City of New York,**

Respondents,

**For an order invalidating and declaring null and void
certain designating petitions filed with the Board of
Elections purporting to designate the within named
Candidates for Public Office and/or Party Positions
from Bronx County to be voted upon in the Democratic
Primary Election to be held on September 15, 2009 and
enjoining the New York City Board of Elections from
placing the Respondent candidates' name on the
official ballot and voting machines for said Democratic
Primary Election.**

HON. ROBERT G. SEEWALD:

In the primary election proceedings now before this Court, Israel Martinez seeks to validate the designating petition filed on his behalf as a candidate for the public office of Member of the City Council from the 17th Councilmanic District in the Democratic Primary to be held on September 15, 2009. In the companion proceeding, objector Grisela Lajara seeks to invalidate the designating petition filed on behalf of Mr. Martinez. The Special Referee has filed his report, and the Court has heard oral argument by counsel for the parties.

The Referee's Report indicates that candidate Martinez had filed 2,031 signatures on his designating petitions. After the review by the Board of Elections of the specification of objections, a total of 1,119 signatures were found to be invalid, with 912 remaining valid signatures. Left for review and determination by the Court were 16

alleged forgeries and 316 alleged dissimilar signatures. The number of valid signatures required for placement on the ballot is 900.

I. Line-by-Line Determinations

An extensive line-by-line review of the Martinez designating petition was conducted by the Special Referees in these matters. Based upon a reading of the Referee's report, it is clear that this review had been severely hampered by the failure of the petitioner-candidate to submit a proper and timely bill of particulars in accordance with the Election Rules of this Court. The Referee reported that the candidate delayed in filing his bill and had submitted three or four separate, and deficient, versions before filing a final bill, which was somewhat in compliance, on the final day of the hearing. This Court notes that petitioner Martinez is an experienced candidate and frequent party to judicial proceedings in election matters in the Supreme Court. The constant pattern of delay in the submission of his bill of particulars is simply inexcusable. The candidate is cautioned that such obstructive and dilatory tactics will not be tolerated in future proceedings.

After the line-by-line considerations on both the invalidating and the validating proceedings, the Referee found that the Martinez designating petition had 812 valid remaining signatures. The Court now confirms the Referee's findings and recommendations as to these rulings.

In reaching the above determinations, the Referee was presented with disputed

issues as to certain subscribing witnesses. These issues will be discussed below.

Discrepancy in Address of Subscribing Witnesses

Certain sheets of the designating petition had been invalidated on the basis that the address listed for the subscribing witness was not the address listed on that individual's voter registration record. It was the position of the candidate's counsel that the addresses listed were, in fact, the actual addresses of the subscribing witnesses at the time the statements of witness had been completed. It was thus argued that the statements, in listing current addresses, were in compliance with §6-132(2) of the Election Law which provides that the statement of witness must recite the following words: "I now reside at (residence address)."

The Court finds the above argument to be lacking in merit. This Court is mindful of cases which have sustained the validity of a statement of witness which set forth an address for the witness which differed from the individual's registration record. (See, for example, *In re McManus*, 286 AD2d 855 (4th Dept. 2001), lv den 96 NY2d 718 [2001].) In *McManus*, the subscribing witness had been in the process of moving during the period in which signatures were being obtained, and the witness had provided his new address on some sheets of the designating petition as a current address, before he had actually moved. The Appellate Division upheld the validity of those sheets with an incorrect address, on the basis that there was no implication of fraud.

This Court notes that *McManus* and cases with similar holdings, in which the

validity of a petition sheet was upheld despite a discrepancy with the individual's address on the registration records, are distinguishable from the matters now before this Court. In that line of cases, the individuals in question either appeared to testify, or some form of evidentiary proof was submitted, to establish the reasons for the discrepancies in the addresses. As to the Martinez designating petitions, there was no admissible proof and no testimony to establish the contentions made by counsel as to the subscribing witnesses current addresses. An assertion by counsel does not constitute admissible evidence (*McGuire v. Gamache*, 5 NY3d 444 [2005]).

In view of the failure of the petitioner-candidate to offer any proof for the consideration of the Court on the issue of the incorrect addresses, the Court upholds the rulings of the Referee invalidating those sheets.

Alterations in the Subscribing Witness Statements of the Candidate

Upon the review of the sheets of the designating petition which had been witnessed by candidate Israel Martinez, the Referee was presented with numerous instances of uninitialed alterations in his statement of witness. The majority of these alterations related to the altered first name of the candidate. His first name, Israel, was, on various sheets, first misspelled as "Isreal" and was then changed, without an initialing. Counsel for the petitioner-candidate argues that this was simply a mere correction and not an alteration. The Referee found these sheets to be invalid, in view of an uninitialed alteration. The Referee also found a variety of other, uninitialed, alterations in the

candidate's statements of witness to be invalid.

Upon review of the Referee's report and after consideration of the oral arguments presented, this Court confirms the Referee's findings and rulings on these uninitialed alterations. Again, no competent proof or testimony was presented to the Referee or to this Court in support of the petitioner-candidate's contentions. Surely the candidate himself could be held to a minimum standard of correctly spelling his own first name in the statement of witness. The alterations in question lead to an inference that another person filled in this information in the statement of witness. Pursuant to §6-134(9) of the Election Law, a person other than the subscribing witness may insert the information required by the statement of witness, provided that all the subscribing witness information is inserted either before the witness signs the statement or in the presence of the subscribing witness.

Although the Election Law thus permits another individual to insert information, including the printed name of the witness, in the statement of witness, this Court rules that any alteration in that statement must either be initialed or explained by testimony or other competent proof. Indeed, §6-134(10) states that the provisions of that section shall be liberally construed, not inconsistent with substantial compliance with that section and the prevention of fraud. The Court of Appeals in *McGuire v. Gamache, supra*, reiterated that the statement of witness has long been recognized as "essential to the integrity of the petition process." The Court continued that it has consistently held that alteration of that

statement which is unexplained and uninitialed will result in the invalidation of that sheet, even if the alterations “resulted in the manifestation of correct information.” In the matters now before this Court, it is not an onerous burden on the petitioner-candidate to require some reasonable explanation for the alterations in issue. Indeed, the candidate was present throughout the vast majority of the hearing and could easily have testified on his own behalf.

II. Symbol Sheet

Counsel for the candidate asserts that the specifications of objections as filed by the respondent-objector are defective for the failure to file a symbol sheet, or a sheet of abbreviations, to indicate the specific nature of the objection being raised. It was established that the objector had not filed a separate symbol sheet with the specifications.

Pursuant to §6-154(2) of the Election Law, the Board of Elections is empowered to make rules in reference to objections and specifications of objections to a designating petition. In accordance with this statute, the Board of Elections in the City of New York promulgated designating petition rules for the September 2009 Primary Election. Rule H6 sets forth some 36 abbreviations which are found acceptable by the Board to assert specific objections. This rule further states: “Objectors may use other abbreviations or symbols as long as they are clearly defined in the specification.”

There is no provision in the above rule which requires a separate symbol or abbreviation sheet if the objectors are simply utilizing the list of abbreviations deemed

acceptable by the Board. As noted above, the objector had not filed a separate symbol or abbreviation sheet. However, there has been no proof submitted by the petitioner-candidate that the objector had used any symbols or abbreviations which were not on the list promulgated by the Board. In light of the above, the Court finds the petitioner-candidate's argument on this issue to be lacking in merit, and insufficient to warrant the nullification of the specifications of objections.

III. Challenge to the Work Product of the Candidate

Counsel for the petitioner to invalidate moved to strike the entire work product of the candidate in his capacity as subscribing witness, based upon the number of dissimilar signatures which had been ruled invalid on his sheets. In oral argument, counsel indicated that 23 instances of dissimilar signatures had been found on those sheets. In the absence of any testimony as to this issue, the Court finds no adequate basis for the invalidation of all designating sheets witnessed by candidate Martinez.

IV. Challenge to the Address of the Objector

The petitioner-candidate has asserted a challenge to the standing of Grisela Lajara to act as an objector as he claims that Ms. Lajara does not reside at the address listed on her registration record. The petitioner-candidate argues that if the objector does not reside at that address, the specifications of objections would be rendered null and void, thereby resulting in his designating petition standing uncontested and with sufficient signatures to secure placement of his name on the Primary ballot. The Referee heard

testimony from several witnesses on this issue and concluded that the candidate had not offered sufficient evidence to rebut the presumption of residence established by the voter registration record of the objector. The Court confirms the Referee's report as to this issue, for the reasons set forth below.

The registration record for the objector, Grisela Lajara, lists her address as 415 East 154th Street, apartment 7, Bronx, New York. This record dates back to 1993. Counsel for candidate Martinez asserted that there is no apartment number 7 at this address, and presented an envelope, addressed to Lajara, Grisela, at that address, at apartment 7, which had been mailed and then returned, marked "returned to sender" by the Postal Service. A representative from the managing agent for the building at 415 East 154th Street was called by counsel for the candidate. This witness testified that he was familiar with this building and stated that there was no apartment number 7. This witness indicated that he has not seen Grisela Lajara and that her name does not appear on the tenant income certification for that apartment 1B. The lease renewal for apartment 1B is in the name of Guillerma Lajara. He conceded that he does not know how many tenants live in this building and could not provide the names of any tenants who reside there.

Counsel for the objector called a representative from the sponsor for the building under an HPD program. This witness explained that the building had undergone extensive renovations which had been completed in 2008. She noted that after completion the numbers for the apartments had been re-designated, and the previous

apartment 7 was designated as apartment 1B. The witness stated that the Lajaras are listed on the lease, but that her office does not maintain any occupancy records.

Counsel for candidate Martinez had asked the Referee to direct the production of the objector Lajara so that her testimony could be taken on the issue of her residence. The Referee declined this request, as he found that the petitioner-candidate had failed to make a sufficient showing to warrant such a direction. Counsel for candidate Martinez then purportedly made attempts to serve subpoenas to effectuate the appearance of the objector. It is evident that proper proof of service of such attempted services was never submitted to the Referee.

Upon review of the Referee's Report and the affidavits of service of the order to show cause in the proceeding to validate, the Court has learned that the petitioner in that case made attempted service upon objector Lajara at both apartments 7 and 1B at 415 East 154th Street. It is clear then, that at the very start of this proceeding, the petitioner-candidate was aware of the connection between the previously numbered apartment 7 and the current designation of 1B. Accordingly, when the Petitioner-candidate asserted that there was no apartment 7 at the building in issue, he presented a partial truth to the Court and had improperly concealed his full knowledge of the matter.

In light of the above, the Court finds that the petitioner-candidate had an insufficient basis at the very start of the proceedings to challenge in legitimate fashion the residence address of the objector. In election matters, the party who challenges the

residency of a candidate has the burden of proof to establish that claim by clear and convincing evidence (*Hosley, Jr. v. Curry*, 85 NY2d 447 [1995]). This Court finds the challenge to the residency of a candidate to be analogous to the situation in these matters, where the residency of an objector is in issue. The Court finds that candidate Martinez has failed to meet that burden. The registration record maintained by the Board of Elections is entitled to a presumption of regularity. The candidate failed to submit sufficient proof to establish that Ms. Lajara does not reside at the address listed thereon. The witnesses from the managing agent and from the sponsor each possessed no real knowledge as to who actually resides at that building, and particularly in apartment 1B. While the name of Grisela Lajara does not appear on the records maintained by the managing agent or the sponsor, it is not the function of this Court, particularly within the context of an election proceeding, to conduct an investigation as to who is officially authorized to live in the units in that building.

The counsel for candidate Martinez also failed to demonstrate that any proper subpoena had been served upon the objector. In view of this failure of proof, this Court draws no negative inference from the objector's non-appearance at the hearing.

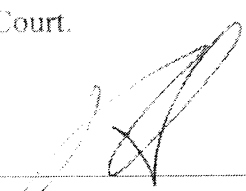
V. Summary

The Referee's Report is hereby confirmed in its entirety. The Martinez designating petition is found to have 812 remaining valid signatures, which is insufficient for placement of his name on the ballot in the Primary election. The Court has denied the

challenge by the candidate to the standing of the objector. Accordingly, the petition to validate is denied, and that proceeding is dismissed. The petition to invalidate is granted, and the Board of Elections is hereby directed to remove the name of Israel Martinez from the ballot in the Primary election to be held on September 15, 2009.

This constitutes the decision and judgment of this Court.

Dated: August 14, 2009



J. S. C.

Gonzalez, P.J., DeGrasse, Freedman, Richter, Abdus-Salaam, JJ.

1016 In re Israel Martinez, etc., Index 260454/09
Petitioner-Appellant, 260441/09

-against-

Frederic M. Umane, et al.,
Respondents,

Grisela Laraja, etc.,
Respondent-Respondent.

In re Grisela Laraja, etc.,
Petitioner,

-against-

Israel Martinez, etc., et al.,
Respondents.

Judgment, Supreme Court, Bronx County (Robert G. Seewald, J.), entered August 14, 2009, affirmed for the reasons stated by Seewald, J., without costs or disbursements.

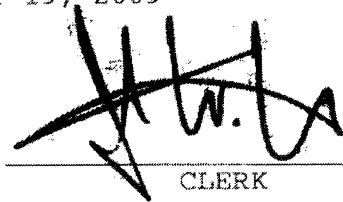
All concur except Freedman and Richter, JJ.
who dissent in a memorandum by Freedman, J.
as follows:

FREEDMAN, J. (dissenting)

I respectfully dissent and would reverse the decision of the court below. The record, as set forth in that court's decision, raises serious questions concerning the objector's standing. Other than a 16-year-old buff card, there was no evidence that objecting petitioner Grisela Lajara lived where she claimed she lived, and there was substantial evidence to the contrary. Her failure to respond to any subpoena issued by respondent, a letter addressed to her that was returned by the post office, the absence of her name on the apartment lease renewal or the income certification form, which is part of the record, and the testimony of the managing agent and of the Executive Director of the sponsor of the building presented prima facie evidence of nonresidency, to which no rebuttal evidence was adduced.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 19, 2009


CLERK

State of New York Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-fifth day of August, 2009

Present, HON. JONATHAN LIPPMAN, *Chief Judge, presiding.*

Mo. No. 2009-983
In the Matter of Israel Martinez,
&c.,

Appellant,

v.

Frederic M. Umane, et al.,
Respondents,
Grisela Laraja, &c.,
Respondent.

In the Matter of Grisela Laraja,
&c.,

Petitioner,

v.

Israel Martinez, &c., et al.,
Respondents.

2009 AUG 28 PM 4: 54
RECEIVED
GENERAL COUNSEL
BUREAU OF ELECTIONS
IN THE CITY OF NEW YORK

The appellant having filed notice of appeal and a motion for leave to appeal to the Court of Appeals in the above title and due consideration having been thereupon had, it is

ORDERED, on the Court's own motion, that the appeal be and the same hereby is dismissed, without costs, upon the ground that the two-justice dissent at the Appellate Division is not on a question of law (CPLR 5601[a]); and it is

ORDERED, that the said motion for leave to appeal be and the same hereby is denied.

Stuart M. Cohen

Stuart M. Cohen
Clerk of the Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

BROTHER T. WILLIAMS BEY, NIYYIRRAH EL,
LINCOLN SALMON, JUAN ANTONIO MARTINEZ,
SR., S. JUAN ANTONIO MARTINEZ, JR., SONYA
SIMMONS, JOYCE NIX, *et al.*,

09 CV 7560 (DLC)

Plaintiffs,

- against -

THE COMMISSIONERS OF ELECTIONS
CONSTITUTING THE BOARD OF ELECTIONS IN
THE CITY OF NEW YORK,

Defendants.

----- x

**DEFENDANT BOARD OF ELECTIONS IN
THE CITY OF NEW YORK'S
MEMORANDUM OF LAW IN SUPPORT OF
ITS MOTION TO DISMISS THE
COMPLAINT**

Defendant Board of Elections in the City of New York (the "Board") submits this memorandum of law in support of its Motion to Dismiss the Complaint (the "Complaint"). Plaintiffs commenced this action alleging that the Board acted without authority when it determined that the designating petitions purporting to nominate Mark Escoffrey-Bey and Israel Martinez to appear on the ballot for the Democratic Primary Election for member of the City Council from the 16th and 17th Council District, respectively.¹ This action should be dismissed because: (1) the plaintiffs have not alleged a federal claim that gives this Court jurisdiction; (2) the state-law claims are time-barred, were actually unsuccessfully litigated by the putative

¹ Initially, it should be noted that the Board of Elections did not administratively remove either of the putative candidates' names from the ballot; the removal was done pursuant to a lawfully issued order by the Supreme Court of the State of New York.

candidates, and the plaintiffs herein have no standing to pursue such claims; (3) in the event that the Court were to construe the Complaint as asserting a claim under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States (the “Fourteenth Amendment”), such a claim is barred by the Second Circuit’s opinion and order in *Rivera-Powell v. New York City Bd. of Elec.*, 470 F.3d 458 (2d Cir. 2006); and (4) the Board, in removing the putative candidates’ names from the ballot was acting in accordance and complying with lawfully issued orders of the Supreme Court of the State of New York. Accordingly, the complaint should be dismissed.

FACTS

By orders dated August 14, 2009, Justice Robert G. Seewald, Supreme Court of the State of New York, Bronx County, issued an order by which he determined that the petitions of both putative candidates, Escoffrey-Bey and Martinez lacked a sufficient number of valid signatures on their designating petitions such that they qualified for placement on the ballot. Affidavit of Brother T. Williams, 3rd Exhibit; Kitzinger Declaration, Exhibit A.

Plaintiffs claim that the Board of Elections wrongfully determined that certain signatures were invalid, Complaint, ¶¶ 16, 20, 23, and 26, and that the manner by which the members of the state judiciary are selected violates their rights.² Complaint, ¶¶ 29 – 34. Putative candidates Escoffrey-Bey and Martinez had the opportunity to litigate these matters pursuant to Article 16 of the Election Law and, in fact, did so, unsuccessfully. Williams Affidavit, 3rd Exhibit; Kitzinger Declaration, Exhibit A.

² This claim is wholly without merit as the Supreme Court of the United States, in *N.Y. State Bd. of Elections v. Lopez-Torres*, 552 U.S. 196 (2008), held that the scheme was lawful and constitutional.

This action was commenced by the filing of the Complaint on or about August 28, 2009.

ARGUMENT

STANDARD OF REVIEW

In reviewing a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a court merely assesses the legal feasibility of the complaint, and does not weigh the evidence that may be offered at trial. *Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir. 1998); *Geisler v. Petrocelli*, 616 F.2d 636, 639 (2d Cir. 1980). All factual allegations in the complaint must be accepted as true, and the complaint must be viewed in the light most favorable to the plaintiff. *LaBounty v. Adler*, 933 F.2d 121, 123 (2d Cir. 1991). Although a court is limited to the facts stated in the complaint, for purposes of a Rule 12(b)(6) motion, the complaint includes any documents attached as exhibits and any documents incorporated by reference. *See Paulemon v. Tobin*, 30 F.3d 307, 308-09 (2d Cir. 1994); *Cortec Industries, Inc. v. Sum Holding, L.P.*, 949 F.2d 42, 47 (2d Cir. 1991), *cert. denied*, 503 U.S. 960 (1992). Further, a court resolving a motion to dismiss the complaint may also consider matters of which judicial notice may be taken. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). Pursuant to Fed. R. Evid. 201, the Court may take judicial notice of facts “not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably challenged.” This includes matters of public record. *Lakonia Management Ltd.v. Meriwether*, 106 F. Supp. 2d 540 (*citing Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 75 (2d Cir. 1998), *cert. denied*, 525 U.S. 1103 (1999)), *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1092 (2d Cir. 1995).

A motion to dismiss should be granted unless plaintiff has pled a set of facts that plausibly state a claim for relief. *Bell Atlantic Corp., v. Twombly*, 550 U.S. 554, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (citing *Twombly*, 550 U.S. at 556. Even liberally construed, plaintiff has failed to plead a set of facts that support recovery under any legal theory that would support federal jurisdiction. Accordingly, the complaint should be dismissed.

POINT I

PLAINTIFF HAS FAILED TO PLEAD A CLAIM FOR WHICH THIS COURT HAS ORIGINAL JURISDICTION.

It is well-settled that the party seeking to invoke federal jurisdiction bears the burden of proving it. *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 57 (2d Cir. 2006). District Courts are courts of limited jurisdiction and have the power to hear only that which is authorized by the United States Constitution and/or statute. *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 552 (2005) (citing *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994)). Sections 1331 and 1332 of Title 28 of the United States Code define the basic contours of a District Court’s original jurisdiction. Section 1331 provides that a District Court shall have original jurisdiction over civil actions that arise under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331.

Here, plaintiff appears to have asserted a garden variety claim under Article 16 of the New York Election Law. As such, the claim does not arise under the Constitution, laws, or treaties of the United States and jurisdiction may not be predicated on 28 U.S.C. § 1331. Section 1332 provides for the District Court to have original jurisdiction over claims between citizens of

different states where the amount in controversy exceeds \$75,000. 28 U.S.C. § 1332. Here, it has not been alleged that plaintiff and defendant are citizens of different states (in fact, both are citizens of the state of New York). Accordingly, jurisdiction may not be predicated on 28 U.S.C. § 1332.

Plaintiffs also make allegations that this action is brought pursuant to 42 U.S.C. § 1983 and that the actions of the Board of Elections violated the “Federal Motor Voter Law” and a “Federal Decree by the United State (sic) Supreme Court.” Complaint, ¶ 23. However, plaintiffs offer no facts or allegations in support of such claims, failing to even identify the alleged Supreme Court decree. This failure to allege sufficient facts to support a federal claim deprives the Court of federal question jurisdiction pursuant to 28 U.S.C. § 1331. Since plaintiff has failed to properly plead a claim over which this court has jurisdiction, the complaint must be dismissed.

POINT II

PLAINTIFF’S STATE LAW CLAIMS ARE WITHOUT MERIT.

Plaintiffs lack standing as voters/signatories to bring an action to validate a petition. Section 16-102 sets for who may bring a proceeding to validate a petition and it limits it to the candidate him/herself. In the instant case, the candidates did in fact each commence and litigate such proceedings. Since none of the plaintiffs herein are the candidates themselves, they lack standing to pursue the state law claims.³ In addition, state law provides that an aggrieved candidate has until the later of two-weeks after the last date to file the petition or three business

³ If the candidates were parties to this action, their claims would be barred by the doctrines of, among others, *res judicata* and collateral estoppel.

days after the Board determined that the petition was invalid. N.Y. Election Law § 16-102(2) (“A proceeding with respect to a petition shall be instituted within fourteen days after the last day to file the petition). Here, the last day to file a designating petition – like the ones filed on behalf of Escoffrey-Bey and Martinez – was July 16, 2009. N.Y. Election Law § 6-158(1). As such, the deadline for the timely commencement of such a proceeding was July 30, 2009, whereas this action was commenced on or about August 28, 2009. Because plaintiffs did not commence this action until August 28, 2009, even if they were to have standing, the claims would be untimely and the Complaint should be dismissed.

Finally, as set forth above, these claims were actually litigated by the candidates and therefore the claims are not subject to relitigation in this court. *See e.g., Hoblock v. The Albany County Board of Elections*, 422 F.3d 77 (2d Cir. 2005).

POINT III

IN THE EVENT THAT THE COURT WERE TO CONSTRUE PLAINTIFF'S CLAIM AS BEING A DUE PROCESS CLAIM, THE SECOND CIRCUIT DECISION IN *RIVERA-POWELL* PRECLUDES PLAINTIFF'S RECOVERY.

In the event that the Court were to construe plaintiffs' claims as asserting a denial of due process, such a claim fails as a matter of law. The Second Circuit, in *Rivera-Powell v. New York City Bd. of Elec.*, 470 F.3d 458 (2d Cir. 2006), held that the plaintiffs therein, both a candidate and her supporters, could not sustain a procedural due process claim against the Board because the Board's procedures – notice of the Board's hearing and the opportunity to be heard – along with the statutory remedy provided by Article 16 of the Election Law, satisfied all procedural due process concerns. *Rivera-Powell*, 470 F.3d at 467 – 68. Therefore, to the extent that this Court were to construe the Complaint as seeking to assert such a claim, such a claim is foreclosed, as a matter of law, by the Second Circuit's ruling in *Rivera-Powell*. The plaintiffs herein, through their candidate, had an opportunity to press the state law claims described above in New York Supreme Court. As set forth above, they did so, albeit unsuccessfully. Accordingly, to the extent that the Court were to construe plaintiff's claim as one that they were denied due process, such a claim fails as a matter of law and the complaint should be dismissed.

POINT IV

**THE BOARD ACTED PROPERLY IN
FOLLOWING A DULY ISSUED ORDER OF A
COURT OF COMPETENT JURISDICTION.**

As set forth in the orders of the Supreme Court attached as exhibits to the Williams Affidavit and the Kitzinger Declaration, the Board of Elections actually had placed both putative candidates on the ballot. It was not until it was ordered by the Supreme Court to strike their names did they. As such, it cannot be said that the Board acted improperly as they would have been in contempt had they not done so.

In addition, plaintiffs' failure to name the parties to the proceedings in Supreme Court in this action, including the putative candidates, raises questions as to whether or not they have joined all necessary parties. Plaintiffs' claims arise from the Supreme Court's determinations in Article 16 proceedings brought by the candidates seeking to validate their respective petitions and those brought by objectors to the petitions, Cordelia Gilford and Grisela Laraja, seeking to invalidate those petitions. It was as a result of these proceedings that the petitions were determined to be invalid and which the plaintiffs herein complain. Oddly, they have failed to name any of the parties to those proceedings, as defendants in this action, instead seeking only to paint a picture of the state court proceedings as being wholly one-sided and completely unfair. Also notably absent from plaintiffs' application for interim injunctive relief is any portion of the Supreme Court record from which they seek relief other than the referee's report and recommendation and the order concerning Escoffrey-Bey..

Finally, in the unlikely event that this Court were to consider the substance of plaintiffs' claims, it is likely that they would be barred by the *Rooker-Feldman* doctrine (*See Hoblock*, 422 F.3d 77, as well as the doctrines of *res judicata* and collateral estoppel. However, such determinations could only properly be made on a more complete record to allow the Court

to determine whether or not the plaintiffs herein are in privity with the putative candidates. Because the claims are otherwise barred, the Board Defendants have not sought discovery on this issue, but reserve their right to do so if and when the need arises.

CONCLUSION

For the reasons set forth herein, the Board of Elections in the City of New York respectfully request that this Court enter an order dismissing the Complaint and for such other and further relief as is just and proper.

Dated: New York, New York
September 2, 2009

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for Defendant Board of
Elections in the City of New York
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New York, New York 10007
(212) 788-0849
e-mail: SKitzing@law.nyc.gov

By: s/Stephen Kitzinger
Stephen Kitzinger
Assistant Corporation Counsel

CERTIFICATE OF SERVICE

I, Stephen Kitzinger, hereby certify that a copy of the attached Defendant Board of Elections in the City of New York's Memorandum of Law In Support of Its Motion to Dismiss the Complaint was caused to be served on the party listed below by first-class mail, postage prepaid, on September 2, 2009.

Brother T. Williams-Bey
c/o 305 E. 170th Street
Bronx, New York 10456

Niyyarra El
1685 University Avenue, #3D
Bronx, New York 10453

Juan Antonio Martinez, Sr.
Juan Antonio Martinez, Jr.
1000 Freeman Avenue
Bronx, New York 10459

Dated: New York, New York
September 2, 2009

s/Stephen Kitzinger
STEPHEN KITZINGER

Cam mtg
FyZ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

BROTHER T. WILLIAMS BEY, NIYYIRRAH EL,
LINCOLN SALMON, JUAN ANTONIO MARTINEZ,
SR., S. JUAN ANTONIO MARTINEZ, JR., SONYA
SIMMONS, JOYCE NIX, *et al.*,

09 CV 7560 (DLC)

Plaintiffs,

- against -

THE COMMISSIONERS OF ELECTIONS
CONSTITUTING THE BOARD OF ELECTIONS IN
THE CITY OF NEW YORK,

Defendants.

----- x

**DEFENDANT BOARD OF ELECTIONS IN
THE CITY OF NEW YORK'S REPLY
MEMORANDUM OF LAW IN FURTHER
SUPPORT OF ITS MOTION TO DISMISS
THE COMPLAINT**

Defendant Board of Elections in the City of New York (the "Board") submits this reply memorandum of law in further support of its Motion to Dismiss the Complaint (the "Complaint") and in response to the affidavits of T. Williams-Bey and Israel Martinez. The only allegation that warrants a response is the claim that a Justice of the Appellate Division was unfairly biased against him and intentionally discriminated against him. The claim that is now asserted is that there was a risk of bias because the adverse party's attorney in the state court proceeding represented the Justice's campaign during the years 2006 and 2007.

Just this last term, the U.S. Supreme Court held, in *Caperton v. A. T. Massey Coal Co.*, No. 08-22 (2009), that it is only where "there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case

had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election." *Id.*, slip op. at 14. Setting aside the fact that plaintiffs have offered no evidence whatsoever on this issue, the Court can take judicial notice of the fact that Justice Luis Gonzalez, the Justice in question, was last re-elected to his public office, at the November 2006 General Election, without meaningful opposition.¹ As such, as a matter of law, neither Mr. Vargas nor Mr. Schlein could have a significant effect on the outcome of the election.

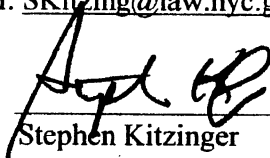
¹ Of the four candidates receiving the most votes for the two available judgeships, Justice Gonzalez received 116,384 votes, Howard Sherman received 105,962 votes, Christopher A. Quaranta received 16,738 votes, and James F. Quinn received 16,343 votes. This information is publicly available on the Board of Elections' website accessible at <http://www.vote.nyc.ny.us/pdf/results/2006/general/recaps/26BronxSupremeCourtDistrict12Recap.pdf>.

For the foregoing reasons, the Board of Elections in the City of New York respectfully requests that the Court grant its motion to dismiss this proceeding.

Dated: New York, New York
September 4, 2009

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for Defendant Board of
Elections in the City of New York
100 Church Street, Room 2-126
New York, New York 10007
(212) 788-0849
e-mail: SKitzing@law.nyc.gov

By: _____


Stephen Kitzinger
Assistant Corporation Counsel

CERTIFICATE OF SERVICE

I, Stephen Kitzinger, hereby certify that a copy of the attached Defendant Board of Elections in the City of New York's Memorandum of Law In Support of Its Motion to Dismiss the Complaint was caused to be served on the parties listed below by email, on September 4, 2009.

Brother T. Williams-Bey
TWBey@yahoo.com

Neil Grimaldi
NGrimaldi2006@hotmail.com

Dated: New York, New York
September 4, 2009



STEPHEN KITZINGER

Count
F2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
Brother T. Williams Bey, Niyyirrah El, Juan
Antonio Martinez, Sr., Juan Antonio Martinez, Jr.

Plaintiffs

Affirmation of
Brother T. Williams-Bey
In Opposition to
Defendant's Motion
To Dismiss

Against

Case No. 09-CV-7560

THE COMMISSIONERS OF
ELECTIONS CONSTITUTING THE
BOARD OF ELECTIONS IN THE
CITY OF NEW YORK

District Court Judge Cote

Defendants

Magistrate Judge Freeman

-----X

Brother T. Williams-Bey, plaintiff, having duly affirmed, deposes and states:

1. I make this affirmation in response to defendant's notice of motion and supporting papers, including the Declaration of Stephen Kitinger and a Memorandum of Law, to dismiss the complaint. The defendant's motion must be denied, and a proceeding held to hear witness testimony.

2. I make this affidavit in support of the plaintiffs' application for an injunction. . . , and in opposition to the defendant's motion to dismiss.

3. Plaintiffs are voters who claim their constitutional rights would be violated if Israel Martinez and Mark Escoffery-Bey do not appear on the ballot.

4. Under 28 U.S.C. 1331, the District Courts has original jurisdiction of civil actions arising under the Constitution, laws, and treaties of the United States.

5. Under 42 U.S.C. 1983, the plaintiffs have a right to bring an action when they are being deprived of their constitutional rights, including their right to vote, due process and equal protection of the laws, under the Fourteenth Amendment, and their First Amendment right to political association. See, Williams v. Salerno, 792 F.2d 323, 326; Koppel v. New York State Board of Elections, 8 F.Supp.2d 382 (S.D.N.Y. 1998).

6. The complaint states valid causes of action, in that the plaintiffs First Amendment right to vote for the candidate of their choice would be violated, constituting a violation of 42 U.S.C. 1983. See, Miguel Jiminez et al v. Westchester County Board of Elections, 03-CV-1673 (S.D.N.Y. 2003)

7. The plaintiffs' claim that the Board of Elections in the City of New York found that Mark Escoffery-Bey and Israel Martinez had satisfied all that was required to be on the ballot, including a sufficient amount of signatures.

8. Thereafter, the New York courts removed these candidates from the ballot in violation of their constitutional rights and those of the voter/plaintiffs.

9. We, the plaintiffs, have substantiated our right to an injunction, because we have established the likelihood of success in this case. If the candidates are not restored to the ballot: Our rights to vote for the candidates of our choice would be denied in this case and we would suffer irreparable injury. See Reynolds v. Sims, 377 U.S. 533 (1964).

10. The right to vote is regarded as a “fundamental political right . . .” preservative of all rights. Yickwo v. Hopkins, 118 U.S. 356, 370; Evans v. Comman, 398 U.S. 419, 422; Burson v. Freeman, 504 U.S. 191, 198.

11. The complaint clearly spells out that the right for candidate to appear on the ballot is integral to the right to vote and is protected by the United States Constitution. Mondonado v. Rodriguez 523 Sup., 177, 179; Williams v. Scalfani, 444 Supp. 906. Williams v. Rhodes, 393 U.S. 23; Smith v. Cherry, 489 Fed. 1098, 1102 (7th Cir.1973).

12. There is no adequate state remedy for the violation of due process committed by *intentional actions* of a judge to rule against a party based on political conditions. Also, there is no significant or logical basis for Justice Louis Gonzalez's decision as stated in the New York Appellate Division minority decision and as the facts that will be presented to this court will prove. This is why the Rivera-Powell v. Board of Elections case, cited by defendant's counsel, does not apply here. Rivera-Powell v. Board of Elections, 470 F.3d 458.

13. In the Rivera-Powell case, Ms. Powell was a candidate (none of the plaintiffs here are candidates). Ms. Powell did have a fair process in state court. Here, the plaintiff/voters could not raise their issues in state court; and politics prevented the state actors from affording the candidates a fair process in state court.

14. In Rivera-Powell v. Board of Elections, *id.*, the plaintiff was seeking to relitigate issues in a federal court that were already litigated in a state court. This is not being done in this case. The state cause of action in Rivera-Powell did not rise to the level of a constitutional violation. In this case it does.

15. Also, where a state law remedy gives a party a meaningful opportunity to challenge the state actions he is not deprived of due process simply because he failed to avail himself of the opportunity. Giglio v. Dunn, 732 F.2d 1133, 1135.

16. The Plaintiffs properly specified a violation of the due process clause of the Fourteenth Amendment in paragraphs 29, 30, 31,32, 33, and 34, which state clearly that the New York State court proceedings were due process violations because of the relationships between the judge, Justice Gonzalez, and opposing counsel. See, affirmation of Israel Martinez.

17. In Lopez-Torres v. New York, 411 F.2d 212, in the United States District Court, Judge John Gleeson, and in the appeal of this case in the United States Court of Appeals for the 2nd Circuit 462 F.3d 161, the courts established all the aforementioned reasons cited, giving this District Court jurisdiction, including the first amendment voter rights and candidates rights, the political associational rights, the associational rights of voters. The United States Supreme Court Decision, Board of Elections v. Lopez-Torres, 522 U.S. 196, that reversed the lower court decisions, did not question the federal jurisdiction of the District Court. Therefore, this court has jurisdiction to decide this case, because this case pertains to the same constitutional rights.

18. Also, the District Court and United States Court of Appeals Lopez-Torres decisions, illustrate the flawed judicial selection process, and the power of the Democratic Party in New York City to select judges. Thus, the Democratic Party has an unfair influence on judges, especially in political cases, as specified in this complaint. Furthermore, the complaint states that the opposing counsel that were successful in removing Israel Martinez and Mark Escoffery-Bey as candidates were too influential in selecting Justice Louis Gonzalez as a judge.

19. In the Appellate Division, the decision of Justice Louis Gonzalez was the deciding vote in a 3-2 decision, as the dissenting opinion illustrates, there was little or no factual basis for the decision to invalidate Israel Martinez's petition.

20. The New York Court of Appeals did not review the candidate cases because the Appellate Division decisions were based on facts. Also, the due process violations stated herein could not be raised in the New York Court of Appeals.

21. The due process violations related to judicial conduct do not have judicial precedence that I could find and do not appear to have been raised in any prior New York Court proceeding.

22. Therefore, the opposing counsel's case citations to dismiss this action do not apply as a basis to invalidate this federal court's jurisdiction.

23. A "garden variety" election dispute regards election irregularities not intentional conduct which is specified in this complaint in violation under 42 USCS 1983. See, Shannon v. Jacobowitz, 394 F.3d 90; 2005 US App. Lexus 259, which holds that intentional conduct is a violation of the due process clause.

24. The allegations of opposing counsel regarding a bond and printing the ballots should not affect the decision of this case. Where the rights of voters have been violated the law must fashion a remedy.

25. In the case of Matheson v. New York City Board of Election, E.D.N.Y., 03-CV-4170, Judge Korman's decision was rendered on September 2, 2003 and the primary was held only seven days later, on September 9, 2003, and no bond was required.

26. Footnote 1 of defendants Memorandum of Law alleges that the Board of Elections did not administratively remove either of the candidates' names from the ballot.

27. However, in the matter of Mark Escoffery-Bey, the Board of Elections did remove "30 signatures in which the individual was duly registered and enrolled but the address on the petition sheet was different than the address on the voter registration card" (Escoffery-Bey Referee's Report, Index #260450-09).

28. The National Voter Registration Act of 1993, the Motor Voter Law, now makes it an illegal violation of Voter's Rights to remove citizens registered with the Board of Election because they moved from one address to another address. "In the case of a change of address, for voting purposes, of a registrant to another address within the same registrar's jurisdiction, the registrar shall correct the voting registration list accordingly, and the registrant's name may not be removed from the official list of eligible voters". Motor Voter Law, Public Law 103-31, Section 8(f).

29. Therefore, the Board of Elections' administrative removal of 30 signatures (above) was illegal and denied plaintiff/voters' equal protection of the law and substantive and procedural due process guaranteed by the Fourteenth Amendment to the Constitution for the United States of America. Plaintiff/voters request an injunction restoring Mark Escoffery-Bey to the ballot; so, therefore, this court has jurisdiction over this federal statute which is being violated.

30. Incidentally, page 5, paragraph 1, of defendant's Memorandum of Law said plaintiffs offer no allegations in support of its allegations "that the actions of the Board of Elections violated the 'Federal Motor Voter Law'". "In the case of a change of address, for voting purposes, of a registrant to another address within the same registrar's jurisdiction, the registrar shall correct the voting registration list accordingly, and the registrant's name may not be removed from the official list of eligible voters". Motor Voter Law, Public Law 103-31, Section 8(f).

31. Plaintiff Williams-Bey has not asserted "a garden variety claim" under Article 16 of New York election law. See Complaint, paragraphs 29, 30, 31, 32, 33, and 34. Hon. Louis Gonzalez, Presiding Justice of the Appellate Division of Supreme Court, First Judicial Department, has violated 42 U.S.C. 1983.

32. Attached is the filings of Justice Louis Gonzalez' judicial election committee for Supreme Court which shows the violation of due process in that Judge Gonzalez paid over ten thousand (\$10,000) to Attorney Howard Vargas, opposing counsel to Israel Martinez in the Appellate Division and opposing counsel to Mark Escoffery-Bey in the New York Court of Appeals.

33. Accordingly, Presiding Justice Gonzalez did not avoid the appearance of impropriety in his dealings with attorney Howard Vargas. Justice Gonzalez should have recused himself from considering the cases of the candidates being removed from the ballot.

34. This glaring evidence of political patronage has the appearance of unfair state judicial processes that denied the candidates and plaintiff/voters' equal protection of the law and procedural and substantive due process guaranteed by the

Fourteenth Amendment of the Constitution for the United States of America. As such, plaintiff/voters' claims arise under the Constitution, laws or treaties of the United States and jurisdiction may be predicated on 28 U.S.C. 1331 and a violation of 42 U.S.C. 1983.

35. In the city of New York judges are selected by the major political parties. In this case, attorney Stanley Schlein and attorney Howard Vargas were attorneys and executors of the Bronx Democratic Party, whom appointed, reviewed and nominated Justice Louis Gonzalez. Attorney's Stanley Schlein and Howard Vargas, executors of the Bronx Democratic Party, also served as each candidates opposing counsel in both the Appellate Division of Supreme Court and New York Court of Appeals.

I, Brother T. Williams-Bey, hereby declare and state under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, except for matters herein stated upon information and belief and, as to these matters, I believe them to be true.

Dated September 3, 2009

New York, U.S.A.

Respectfully submitted,

Brother T. Williams-Bey

Brother T. Williams-Bey
Plaintiff, In Person
C/o. 305 E. 170th Street
Bronx, New York, 10456

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
Brother T. Williams Bey, Niyyirrah El, Juan
Antonio Martinez, Sr., Juan Antonio Martinez, Jr.
Plaintiffs

Affidavit of Israel Martinez

Against

Case No. 09-CV-7560

THE COMMISSIONERS OF
ELECTIONS CONSTITUTING THE
BOARD OF ELECTIONS IN THE
CITY OF NEW YORK

District Court Judge Cote

Magistrate Judge Freeman

Defendants
-----X

I, Israel Martinez, having duly affirmed, depose and state:

1. I am familiar with the facts and circumstances of this case.
2. Judge Louis Gonzalez, Presiding Justice of the Appellate Division of New York Supreme Court, First Judicial Department, did intentionally and willfully violate my due process constitutional rights, under the Fourteenth Amendment of the U.S. Constitution. The manner in which Justice Gonzalez presided, deliberated with others, and voted, in the case to validate my petition In re Israel Martinez v. Frederick Umane, 260454-09, and in the case to invalidate my petition, In re Grisela Laraja v. Israel Martinez, Index, 260441-09 to exclude me from the ballot entered August 19, 2009, affixed hereto as appendix A, was a willful violation of the due process rights of the voters for the aforementioned reasons he was prejudiced and voted accordingly against me.

3. I have known Justice Louis González for more than 10 years, in that he was an active member of the South Bronx Democratic Club which was under the leadership of Ramon Velez, and where Carmen Arroyo was also a member, together with her daughter Councilwoman Maria Del Carmen Arroyo. Assemblywoman Carmen Arroyo has been very active in the cause to invalidate my candidacy. She attended and worked at the Board of Elections in the Bronx county office during the hearings had involving my candidacy for City Council.

4. Grisela Laraja, the Objector, to invalidate my petition, in case 260441-09, according to N.Y. State Assembly records, has been and is an employee of Assemblywoman Carmen Arroyo. Grisela Laraja is a special assistant to Carmen Arroyo on her New York State Assembly payroll. Assemblywoman Carmen Arroyo's daughter, Maria Del Carmon Arroyo, is a sitting City Councilmember in City Council District 17, for the office I am seeking.

5. Justice Louis Gonzalez became a judge and elected New York Supreme Court Justice, in part, due to the political influence of Assemblywoman Carmen Arroyo, and her daughter, Maria Del Carmon Arroyo, for which reason, Justice Louis Gonzalez should have recused himself when the case came before him at the Appellate Division of Supreme Court.

6. I also know that The South Bronx Democratic Party has supported Justice Louis Gonzalez in his election to Supreme Court and in his elevation to the Appellate Division of Supreme Court, which is another reason that Justice Gonzalez should have recused himself when the case came before him at the Appellate Division.

7. The attorneys for the South Bronx Democratic Party, who are instrumental in selecting judicial candidates and having their candidates approved by the Democratic Party, were Stanley Schlein and Howard Vargas, who were the attorneys during all of the New York State Proceedings against me in the New York Supreme Court, the Appellate Division of Supreme Court case, and the New York Court of Appeals case.

8. The fact that Stanley Schline and Howard Vargas were attorneys in those cases was a sufficient reason why Justice Louis Gonzalez should have recused himself.

9. I have attached hereto and made a part hereof, records from Justice Louis Gonzalez' Election campaign, which prove that Justice Louis Gonzalez did pay Howard Vargas, over ten thousand (\$10,000) dollars during 2007, which is conclusive proof that Justice Louis Gonzalez should have recused himself in this case and did commit a violation of my constitutional rights and the rights of the plaintiff/voters in this case.

10. The case before the Appellate Division was decided 3-2 against me, and Justice Louis Gonzalez voted against me. His decision was crucial and decisive, which further illustrate the violations of the constitutional rights of the plaintiff/voters.

11. A review of the referees Report, Justice Robert Seewald's decision, and the Appellate Division dissenting opinion will unequivocally illustrate that Rosella Laraja's invalidation of my petition in 260441-09 must have been dismissed, because there was no rational basis for a decision in her favor, and therefore my

petition to validate was required to be granted since I had the requisite number of signatures and she should have had the case dismissed because she could not substantiate her residence in the Council District as is required for her to bring the action to invalidate my petition.

12. Every time the state of New York wants to make a change affecting the Voting Rights Act, the state must seek permission from the U.S. Department of Justice. Compare, for example, Electoral Fraud. Also, the 16th and 17th Councilmatic Districts are under the protection of the U. S. Department of Justice pursuant to the Voting Rights Act. Therefore, it is proper for this Voter Rights case to be heard in the United States District Court for the Southern District of New York.

I, Israel Martinez, hereby declare or certify, verify and state under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Respectfully submitted

Dated September 3, 2009
New York, U.S.A.

Israel Martinez

Israel Martinez
C/o. 305 E. 170th Street
Bronx, New York, 10456

Comments
FYL

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DATE: September 2, 2009

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**RE: Matter of Lewis v. Hummel (NY Sup. Ct. # 111509/09) - App. Div. First Dept
Respondent-Appellant's Brief**

TOTAL PAGES INCLUDING COVER SHEET: 32

REMARKS: Per App. Div. Briefing Schedule - Arthur W. Greig *AGS*

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

-----X

INDEX NO.
111509/2009

IN THE MATTER OF THE APPLICATION OF

ANNA R. LEWIS,

Petitioner - Respondent,

-against-

LYDIA HUMMEL,

Respondent-Appellant,

-and-

THE NEW YORK CITY BOARD OF ELECTIONS,

Respondent-Respondent

-----X

RESPONDENT-APPELLANT'S BRIEF

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QUESTIONS PRESENTED

Question 1: Was there sufficient credible testimonial evidence and a basis in the record for the Court below to validate 39 signatures allegedly witnessed by subscribing witness Richard D'Ornellas on five (5) separate designating petition sheets where the witness testified under oath before the Special Referee that he had witnessed a forgery to at least one of the petition sheets, and was made aware that there were forgeries to each of the petition sheets, and where D'Ornellas had materially altered the signature of an unidentified subscribing witness to those very same petition sheets?

Answer 1: The Court below said "Yes."

Question 2: Was Supreme Court correct in over-ruling the findings of fact and rulings of the Special Referee with respect to the 39 signatures allegedly witnessed by Richard D'Ornellas on the five (5) petition sheets in question where the Special Referee found that, "This testimony of this witness was all at once contradictory and insufficiently credible to allow for the petition sheets at issue to be validated?"

Answer 2: The Court below said "Yes."

Question 3: Based on the legislative purpose and intent behind Election Law Section 6-132 and rules pertaining to subscribing witness statement alterations, did the Petitioner sustain her burden of proof in establishing the validity of the 39 signatures and five (5) petition sheets where the Board of Elections had previously invalidated said signatures and sheets based on unexplained subscribing witness alterations?

Answer 3: The Court below said "Yes."

STATEMENT OF FACTS

In an effort to insure absolute fairness to this Petitioner, the New York City Board of Elections twice completely canvassed her petitions to determine if sufficient valid signatures appeared on her petition to allow her designation to the Democratic candidate for Civil Court Judge from the Third Municipal District. It was unable to find such number of signatures. In a similar spirit the Special Referee conducted three days of hearings and testimony, including extending the final day far beyond what he had originally allotted the Petitioner to try to make her case. Despite the latitude shown the petitioner by the Special Referee, she once again fell far short of the necessary valid signatures.

Despite the extensive record created by the Board of Elections and the Special Referee, the Court below, without conducting any further factual hearings, reversed the findings of fact of the two complete canvasses by the Board of Elections and three days of hearings by the Special Referee by re-instating signatures that the Petitioner's witness conceded contained a forged signature of an unknown person who was now unavailable because he allegedly had a stroke. Such testimony cannot be made up. But such testimony cannot be used to sustain a designating a candidate to grace the bench of the Civil Court.

The Petitioner, Anna R. Lewis, filed a designating petition seeking to be designated a candidate for the Judge of the Civil Court in the Third Municipal District in the New York County Democratic Primary to be held on September 15, 2009. This petition consisted of five petition volumes, to wit, NY0900543, NY0900608, NY0900609, NY0900705, and NY0900706.

The Objector, Lydia Hummel, filed a General Objection with the New York City Board of Elections (the "BOE") on July 20, 2009. She subsequently filed Specifications of Objections with the BOE on July 27, 2009 alleging that the total number of valid signatures on the petition was less than the 1500 required for securing a position on the Democratic Primary ballot.

On August 10, 2009, the BOE issued its revised Clerk's Report finding that the designating petition contained 1166 valid signatures, 334 less than the 1,500 required by law for a candidate seeking a place on the ballot for the New York County Democratic Primary to be held on September 15, 2009.

After Petitioner brought the instant validating proceeding under the Election Law in New York Supreme Court, on August 17, 2009, the proceeding was referred to Special Referee Leslie Lowenstein to Hear and Report with recommendations.

The hearing commenced on August 17, 2009 at 2 PM and proceeded the rest of that day, the following day and until conclusion on August 19, 2009. The Referee rendered his Report on August 20, 2009 , and found only 1,256 valid signatures on the petition and recommended confirmation of the Report and an order denying validation of the designating petition.

The Referee made the following rulings and findings of fact after three days of hearing:

A) 207 signatures which were invalidated by the Board of Elections due to the failure of the subscribing witness to correctly insert "County" information in the Witness Identification Information on various petition sheets remained invalid pursuant to Election Law §6-132(2) and relevant case law. The Board of Elections had previously ruled that these signatures were invalid, and had disqualified the signatures. The Referee sustained disqualification of these signatures.

B) 40 signatures identified and objected to in Respondent's specification of objections were invalidated by the Board of Elections due to the signatories not being qualified to sign a petition either because they were not registered as a voter at all, were not enrolled in the Democratic Party or lived outside of the 3rd Municipal Civil Court District. These signatories were not

qualified under the law to sign a designating petition for a candidate in a Democratic Primary within the 3rd Municipal Civil Court District (See Election Law §6-136 (2) (c)). The Board of Elections had previously ruled that these signatures were invalid, and had disqualified such signatures. The Referee sustained the disqualification of these signatures.

C) 39 signatures allegedly witnessed by one Richard D'Ornellas as subscribing witness were also disqualified by the Board based on material alteration to the subscribing witness statement section signature. The Board of Elections had previously ruled that these signatures were invalid, and had disqualified such signatures. The Referee sustained the disqualification of these signatures.

With respect to the 39 signatures identified above ("the D'Ornellas signatures"), Richard D'Ornellas testified at the hearing before the Referee. His sworn testimony established, among other things, that an un-named individual who D'Ornellas allegedly petitioned with on 5 separate dates and who was a "volunteer", but who he knew but refused to name while testifying under oath, had, in D'Ornellas' presence, forged the name of one Leonard Kane ("Lenny") onto petition sheet Page 7 of Volume 609, as the subscribing witness.

D'Ornellas then went on to testify (in contradictory fashion) that he had not seen the un-named individual forge the name of Leonard Kane to the petition sheets and that he did not know how the name "Leonard Kane" came to be on those petition sheets other than Leonard Kane allegedly told him that the un-named individual had signed the sheets for him.

D'Ornellas then admitted that the "un-named" individual who had apparently forged the subscribing witness name of Leonard Kane onto the petition sheets either in D'Ornellas' presence or outside of D'Ornellas' presence, depending on which version of D'Ornellas' testimony the Court chose to believe, was not a registered voter, and "had no business signing sheets." D'Ornellas also testified that "Lenny would sit in front of our club for hours and hours and days on end," and that the un-named man was "helping Lenny do the sheets." Finally, D'Ornellas testified that he told Lenny "I'm going to cross this out and I'm going to witness your petitions."

Leonard Kane neither testified in this proceeding nor gave an affidavit on behalf of Petitioner. The un-named individual who forged the name of Leonard Kane as subscribing witness onto the five (5) petition sheets was never identified by D'Ornellas and never testified in court or gave an affidavit on behalf of Petitioner.

The Referee affirmed the Board's ruling disqualifying the 39 "D'Ornellas" signatures, stating in relevant part, that D'Ornellas' "testimony could not conclusively establish that he had indeed gathered the signatures which appeared upon these petition sheets. This testimony was all at once contradictory and insufficiently credible to allow for the petition sheets to be validated."

The motion to confirm/disaffirm the Referee's Report was heard before Supreme Court on August 25, 2009. On August 27, 2009, the Court below (J.S.C. Edward H. Lehner, Part 19) issued its decision restoring Petitioner to the ballot with a total of 1,502 valid signatures.

Respondent-Appellant believes the Court below erred in rejecting the Referee's Report on the Witness Identification Information issue and validating the 207 signatures where the petition sheets contained the incorrect "County" designation in the Witness Identification Information section of the petition sheets. Respondent-Appellant acknowledges, however, that recent case law from other Judicial Departments has permitted validation of such signatures under similar circumstances (See Dalton v. Wayne County Board of Elections, ___ A.D.3d ___, 2009 WL 2525414 [4th Dept]). However, adherence to prescribed statutory content in petitions requires disqualification of such signatures absent binding precedent in this Judicial Department or Court of Appeals authority.

However, even crediting those 207 additional signatures to Petitioner still leaves her short of the required 1,500 valid petition signatures. It is only with the validation of the 39 "D'Ornellas" signatures that Petitioner achieves the 1,502 valid signature figure arrived at by Supreme Court, and it is that specific portion of the underlying judgment, in particular, which Respondent-Appellant addresses and appeals from herein. Absent validation of the D'Ornellas signatures, Petitioner falls short of the required number of signatures.

On August 28, 2009, the judgment was entered in New York County Supreme Court and Respondent filed a Notice of Appeal and Pre-Argument Statement with Supreme Court, New York County. On August 31, 2009, Respondent-Appellant made an application for Expedited Service (in this case an expedited appeal) with this Court, which application was ultimately granted by consent of the parties.

LEGAL ARGUMENT

Section 6-132 of the Election Law governs the prescribed content in a designating petition. (See Matter of Vassos v. NYC Board of Elections , 286 A.D. 2d 463, 464 [2nd Dept. 2001]) The Election Law requires strict compliance with statutory commands as to matters of prescribed content (Walter & Hutson v.

Bass, 54 N.Y.2d 772, 774 [1981]); Matter of Hill v. New York State Board, 22 A.D. 3rd 957[3rd Dept. 2005]). Witness identification information, i.e., the town or city and the county of residency of the subscribing witness is prescribed by statute (See, Election Law, § 6-132(2)).

Despite repeated opportunities, the legislature has not softened this requirement in its numerous recent amendments of this section. This section of the statute has been amended by the legislature in 1995, 1996, 2000 and 2006, each time leaving intact the requirement of inclusion of the subscribing witness's town, city or county information. (see, L. 1995, C. 476 sec 1; L. 1996 c. 197 §1; L. 2000, c. 235, §1; L. 2006, c.447, §1; Stark v. Kelleher, 32 A.D.2d 663 [3d Dept 2006]).

Accordingly, the 207 signatures disqualified by the Board and the Referee on the basis of incorrect Witness Identification Information should also have been properly disqualified by Supreme Court.

The 40 signatures disqualified by the Board of Elections, the Referee and Supreme Court due to those signers not being qualified to vote in a Democratic Primary within the 3rd Municipal Civil Court District should be affirmed.

Here, Petitioner seeks to have this Court validate her designating petition on the basis of 40 signers who are not qualified and could not vote in this primary

election because they were not “then enrolled voters of the party residing within the political unit in which the office or position is to be voted for.” (See Election Law §6-136 (?)). The Board, the Referee and Supreme Court properly disqualified those signatures based on those 40 signatures having been properly identified in Respondent’s Specification of Objections filed with the Board of Elections, even though the Board ultimately struck the signatures “as specified” on technically different grounds (Matter of Smith v. Marchi , 143 A.D.2d 325 [2d Dept 1988] ; Brotherton v. Board of Elections , 33 A.D.3d 944 [2d Dept 2006]; see generally , Bradlow v. Board of Elections , 144 Misc.2d. 793 [Sup Ct NY County]). Clearly, those 40 signatures were properly disqualified by the Board of Elections and the Referee, and Supreme Court.

Thus the crucial issue before this Court is with respect to the 39 signatures allegedly witnessed by two subscribing witnesses, Richard D’Ornellas and Leonard Kane. These five (5) petition sheets (Appendix A) were then materially altered by D’Ornellas, who crossed out the subscribing witness signature of Leonard Kane on each sheet.

Supreme Court erred in crediting the D’Ornellas signatures by overlooking the sworn testimony which established forgery on the petition sheets, then ignored the proper legal standard for curing material alterations to petitions under the

Election Law (“satisfactory and credible explanations for the alterations”), then improperly shifted the burden of proof in this validating proceeding away from Petitioner by describing the D’Ornellas testimony as “consistent” and “uncontroverted” despite lack of any such consistency in the actual record from the only witness produced by Petitioner on this issue. It was not Respondent’s burden to “controvert” the D’Ornellas testimony. It was Petitioner’s burden to establish the validity of said signatures by clear and convincing evidence. This Petitioner failed to do.

This record is without any sworn testimony or any affidavit from Leonard Kane concerning the sheets and 39 signatures in question, even though the burden of proof in this validating proceeding is on the petitioner.

It is the moral and legal duty of the challenged candidate to produce a subscribing witness presumed to be under her control and the unexplained failure to produce Leonard Kane as a witness in this proceeding, even absent a subpoena, justifies an adverse inference with respect to those 39 signatures (Matter of Haas v. Costigan, 14 A.D.2d 809 [2d Dept 1961]). Here, only Leonard Kane could have properly testified as to whether he had signed or not signed the petition sheets, or whether someone else had signed the sheets for him.

Similarly, the unexplained failure to produce the un-named individual who fraudulently endorsed these petition sheets justifies an adverse inference with respect to those 39 signatures. The alteration of the Leonard Kane signature by someone other than the person who put the signature on those sheets is unexplained and material, and requires that those sheets be disqualified.

Here, the mere fact that D'Ornellas refused to name this purported individual during cross examination, even though he stated under oath that he knew who this person was, destroys both the credibility and the veracity of much of D'Ornellas' testimony. It also factually undermines Supreme Court's characterization of the testimony as "consistent" and "uncontroverted" as such testimony relates to the material alteration of the witness statements on those petition sheets.

If unexplained material alteration is made to a witness statement, the entire page should be invalid (Jonas v. Velez, 65 N.Y.2d 954 [1985]; see Matter of Sheldon v. Sperber, 45 N.Y.2d 788 [1978]).

Here, the only witness the Petitioner produced on this issue was neither Leonard Kane nor the "un-named" individual who allegedly forged Leonard Kane's name to those petition sheets.

In order to cure or explain a material alteration such as identified on the D'Ornellas sheets and by D'Ornellas sworn testimony, a witness has to offer satisfactory and credible explanations, devoid of any suggestion of fraud or wrongdoing, for such alterations (Curley v. Zacek, 9 Misc. 3d 1120 [Sup Ct, Saratoga County 2005]; see Matter of Grancio v. Coveney, 60 N.Y.2d 608 [1983]). Here, D'Ornellas' explanation for the alterations was that there had been forgery to the affected petition sheets by an un-named individual who he refused to name and who did not testify at the hearing.

Further, D'Ornellas purported "explanation", much of which amounts to inadmissible hearsay testimony by D'Ornellas about alleged statements to him by Leonard Kane, is neither satisfactory nor credible. At best, such testimony only conclusively establishes that there was a forgery by someone to the subscribing witness section on the affected sheets. At worst, such testimony was perjurious, deftly tailored to resurrect fraudulently witnessed and improperly altered petition sheets.

D'Ornellas also testified that once he found out that the forger of the Leonard Kane subscribing witness signatures (who he was familiar with but refused to name) was not a registered voter, he knew that "he had no business signing sheets."

The subscribing witness to a designating petition must be an enrolled member of the party and that is a substantive requirement (Hoshhauser v. Grinblat, 307 A.D.2d. 1007 [2d Dept 2003]).

The clear import of this portion of the testimony was that D'Ornellas saw nothing wrong with the forgery of another's signature onto the sheets, but somehow apparently believed that forgery by an unregistered voter was improper and felt compelled to act only because of the non registered status of the forger.

Nothing in the testimony of Richard D'Ornellas effectively explains why he apparently permitted an unknown person to forge Leonard Kane's signature to at least one of the petition sheets in his presence, or alternatively, how, when, where, or by whom the "phony" Leonard Kane signatures were forged onto the relevant petition sheets outside of his presence.

Finally, Supreme Court erred in rejecting the Special Referee's report, where, as here, the Special Referee, as the trier of fact, was in the best position to determine the issues presented (Poster v. Poster, 4 A.D.3d 145 [1st Dept 2000]).

Petitioner has failed to sustain her legal burden of proof in this validating proceeding.

POINT I

THERE WAS INSUFFICIENT CREDIBLE EVIDENCE BEFORE SUPREME COURT TO VALIDATE THE 39 "D'ORNELLAS" SIGNATURES

Where a petition is invalidated by the Board of Elections and a proceeding is instituted to reinstate the petition, the burden of proof is on the candidate to establish that the petition is valid, who must prove the petition's validity by clear and convincing evidence (Matter of Goldstein v. Carlsen , 59 A.D.2d 642 [4th Dept 1977], aff'd 42 N.Y.2d 993; Matter of Bloom v. Power , 21 Misc.2d 885, aff'd 9A.D.2d 626, aff'd 6 N.Y. 2d 1001; Matter of Mielnicki v. New York State Board, 224 A.D.2d 819 [3d Dept 1996]).

Here, the D'Ornellas signatures were invalidated by the NYC Board of Elections based on unexplained alterations to the subscribing witness statement section - i.e., the fact that there were two subscribing witness signatures from two separate witnesses, one of which was crossed out by the other purported witness. It was therefore incumbent upon Petitioner to produce the subscribing witness whose signature was crossed out, to explain how his signature came to be crossed out and why he himself did not cross out the signature if there was some infirmity in the signature.

Petitioner did not produce Leonard Kane to testify, nor did she produce the mysterious (but known) volunteer worker who had allegedly forged Leonard Kane's signatures onto five (5) sheets as subscribing witness to testify. The witness she did produce testified to a forgery of Leonard Kane's signature committed in his presence (Hearing Transcript, 8/18/09, Page 38, Lines 20-21) (see generally , Matter of Metzger v. Eagan , 24 A.D.2d 719, affd 16 N.Y.2d 837), which should have nullified all further D'Ornellas testimony concerning these petition sheets.

Accordingly, Petitioner failed to satisfy the burden of proof required in a validation proceeding where a board of elections has invalidated petition signatures based on a material alteration of the petition.

POINT II

SUPREME COURT IMPROVIDENTLY EXERCISED ITS' DISCRETION IN REJECTING THE CREDIBILITY DETERMINATIONS MADE BY THE REFEREE

The Special Referee in this proceeding was empowered to hear and report, and to make recommendations. Here, the Referee heard the testimony of Richard D'Ornellas, asked D'Ornellas questions on the record in an attempt to clarify some of his confusing and improbable testimony (Hearing Transcript, Page 41, Line 26 to Page 42, Line 5) , and ultimately determined that the testimony "could not

conclusively establish that he had indeed gathered the signatures which appeared upon those petition sheets.” (Special Referee’s Report and Recommendations dated August 20, 2009, Page 5).

He then explained that the “testimony of this witness was all at once contradictory and insufficiently credible to allow for the petition sheets at issue to be validated.” The report of a special referee will be confirmed “whenever the findings contained therein are substantially supported by the record.... and the referee has clearly defined the issues and resolved matters of credibility,” (Kaplan v. Einy , 209 A.D.2d 248, 251 [1st Dept 1994]). As the finder of fact, the special referee is empowered to resolve matters of credibility (Kardanis v. Velis , 90 A.D.2d 727 [1st Dept 1982]).

Here, Special Referee Lowenstein clearly set forth in the report in great detail the issues and his credibility determinations, particularly with respect to the D’Ornellas testimony, and a review of the hearing transcript shows that such findings and are substantiated by the record (see Freedman v. Freedman , 211 A.D.2d 580 [1st Dept 1995]).

This is particularly true where conflicting testimony and matters of credibility are at issue, since the referee, as the trier of fact, had the opportunity to see and hear the witnesses and to observe them on the stand (Frater v. Lavine , 229

A.D.2d 564 [2d Dept 1996]). The findings of such a referee will not be disturbed if supported by the evidence in the record (Namer v. 152-54-56 W 15th St. Realty Corp., 108 A.D.2d 705 [1st Dept 1985]; Kaplan v. Einy , 209 A.D.2d 248, supra).

Supreme Court acknowledged “certain inconsistencies” in the D’Ornellas testimony, but instead fashioned a new, improper and erroneous standard of review for instances of material alteration to petitions by announcing that “in light of D’Ornellas’ consistent and uncontroverted testimony that he did witness all the signatures to which he signed as subscribing witness, his testimony with respect thereto should be accepted and the signatures validated.”

Supreme Court never addressed whether D’Ornellas had adequately explained the reason for the alterations to the petition subscribing witness signatures (Matter of Jonas v. Velez , 65 N.Y.2d 954 [1985]; see Matter of Sheldon v. Sperber , 45 N.Y.2d 788 [1978]).

Supreme Court never addressed whether the “explanation” offered by D’Ornellas was satisfactory and credible, devoid of any suggestion of fraud or wrongdoing, for such alterations (Curley v. Zacek , 9 Misc. 3d 1120 [Sup Ct, Saratoga County 2005]; see Matter of Grancio v. Coveney, 60 N.Y.2d 608 [1983]).

Supreme Court never addressed the testimony as to forgery on the petition sheets, or the fact that the witness testified to the forgery of the subscribing witness signature in his presence with respect to Volume 609, Page 7 (Hearing Transcript, Page 38, Lines 20-21).

Supreme Court never addressed the failure and refusal of D'Ornellas to name and identify the person who forged the signature of Leonard Kane onto the petition sheets (Hearing Transcript, Page 38, Lines 9-19) even though he knew who he was.

Supreme Court never addressed Petitioner's failure to satisfy her burden of proof to produce the appropriate witnesses who could have offered non-hearsay explanations for the material alterations to the petitions.

Finally, Supreme Court appears to have improperly attempted to shift the burden of persuasion to Respondent by announcing that D'Ornellas' testimony about witnessing the 39 signatures was "consistent" and "uncontroverted" in spite of the patently "incredible" testimony as to forgery, four debilitating strokes, alleged inability of a subscribing witness to sign his name, unregistered voters, three people allegedly all petitioning together on five separate dates in June, 2009 and all three persons allegedly witnessing the same 39 petition signatures on those five different dates in June, 2009.

Yet Supreme Court rejected the findings and conclusions of the Special Referee, the actual fact finder here, who had found the very same testimony to be contradictory and not sufficiently credible to allow validation of the signatures, even though the determination of a special referee to hear and report is entitled to great weight (Slater v. Links at North Hills , 262 A.D.2d 299 [2d Dept 1999]). Instead, Supreme Court attempted to lay fault on the Respondent for not “controverting” the fantastical testimony of Richard D’Ornellas.

Supreme Court arrived at this conclusion without calling any further witnesses, and without any further or additional evidence other than the transcript of the same testimony before the Special Referee. Such a rejection of the Special Referee’s findings and conclusions was an improvident exercise of judicial discretion by Supreme Court under these circumstances, and requires a reversal of Supreme Court’s judgment in this matter.

POINT III

SUPREME COURT FAILED TO ADHERE TO THE LEGISLATIVE PURPOSE AND INTENT BEHIND ELECTION LAW SECTION 6-132 AND THE LAW PERTAINING TO SUBSCRIBING WITNESS ALTERATIONS AND PETITION INTEGRITY

Essential to the integrity of the petition process is the subscribing witness’s statement authorized by Election Law §6-132. It does not unduly burden the

designating petition process to require that a subscribing witness whose statement has been changed initial the change and explain the reason for it (see Matter of Jonas v. Velez, 65 N.Y.2d 954, supra; Matter of McHale v. Smolinski, 133 A.D.2d 520 [4th Dept 1987]).

The alterations made to these five (5) petition sheets were not “inconsequential” and since they were never properly or adequately explained, such alterations require invalidation of these petition sheets (Abraham v. Bumbalo, 43 A.D.3d 1271 [3d Dept 2007]; see generally Matter of Buchanan v. Espada, 230 A.D.2d 676 [1st Dept 1996]).

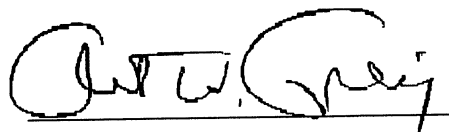
CONCLUSION

The Court should reverse the judgment of Supreme Court, reinstate the findings and determinations of the Special Referee’s Report, and issue an order directing that the Petitioner Candidate be removed from the ballot based on an insufficient number of valid signatures on her designating petition to qualify her for the primary ballot.

Dated: New York, N.Y.

September 2, 2009

Respectfully submitted,



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VOLUME NY 09 00609
SHEETS 5, 7, 12, 18 & 19

TO-ROBERTS JACOBS GREIG

FROM-000000000-0-1

SEP-02-2009 09:00PM

New York State		
DENISE SPILLANE	Female Assembly District Leader from the 78th Assembly District Part B New York County New York State	400 West 43rd Street New York, New York 10018
JAMES R Mc MAHON LUCILLE DEAN BENE MAUREEN SPILLANE	Members of the Democratic County Committee from the Election District of the 78th Assembly District New York County New York State	350 WEST 42nd STREET NY NY 10018 400 WEST 42nd STREET NY NY 10018 400 WEST 42nd STREET NY NY 10018

I DO HEREBY APPOINT— NAMES: MARY D'OLA, JAMES BRUNSON, THOMAS W. GARDNER
ADDRESSES: 717 78th Avenue, New York, NY 10019; 478 West 48th Street, New York, NY 10018; 250 West 46th Street, New York, NY 10018

All of whom are qualified voters of the Democratic Party as a committee to fill vacancies in accordance with the provisions of the Election Law.
In witness whereof, I have hereunto set my hand, the day and year first opposite my signature.

DATE	Name of Signer (Signature Required)	Residence	County
6/15/09	[Signature]	Borough of Manhattan, New York City	New York
6/15/09	[Signature]	214 West Street, New York City	New York
6/15/09	[Signature]	Borough of Manhattan, New York City	New York
6/15/09	[Signature]	221 West Street, New York City	New York
6/15/09	[Signature]	422 West 57th Street, New York City	New York
6/15/09	[Signature]	Borough of Manhattan, New York City	New York
6/15/09	[Signature]	400 West 42nd Street, New York City	New York
6/15/09	[Signature]	Borough of Manhattan, New York City	New York
6/15/09	[Signature]	317 West 55th Street, New York City	New York
6/15/09	[Signature]	504 West 42nd Street, New York City	New York
6/15/09	[Signature]	Borough of Manhattan, New York City	New York
6/15/09	[Signature]	470 West 42nd Street, New York City	New York
6/15/09	[Signature]	Borough of Manhattan, New York City	New York
6/15/09	[Signature]	185 West 42nd Street, New York City	New York
6/15/09	[Signature]	780 9th Avenue, New York City	New York
6/15/09	[Signature]	300 West 42nd Street, New York City	New York
6/15/09	[Signature]	670 West 42nd Street, New York City	New York

STATEMENT OF WITNESS

I, FORWARD DORNELLIS, do hereby certify that I am a duly qualified voter of the City of New York, and an enrolled voter of the Democratic Party, I now reside at 375 WEST 42ND STREET, New York, New York. Each of the individuals whose names are subscribed to this petition sheet containing 13 signatures, subscribed the same in my presence on the dates above indicated and identified himself or herself to be the individual who signed this sheet. I understand that this statement will be accepted for all purposes as the equivalent of an affidavit and, if it contains a material falsehood, shall subject me to the same penalties as if I had sworn to it.

Date: 6-29 2009
 Signature: [Signature]
 Signature of Witness: [Signature]

WITNESS IDENTIFICATION INFORMATION:
 The following information must be completed prior to filing with the Board of Elections in order for this petition sheet to be valid:

City: New York County: New York

SHEET NO. 5

New York State

Female Assembly District Leader
from the 75th Assembly District
Part 14
New York County
New York State

400 West 43rd Street
New York, New York 10018

Members of the
Democratic County Committee
from the
Election District
of the
75th Assembly District
New York County
New York State

THE MAY APPOINT— NANNY MARY DELA
JANITA SIMPSON
THOMAS M. CHECO

ADDRESS: 147 14th Avenue, New York, NY 10018
375 West 42nd Street, New York, NY 10018
328 West 40th Street, New York, NY 10018

All of whom are enrolled voters of the Democratic Party, or a committee to nominate in accordance with the provisions of the laws of this State.
In witness whereof, I have hereunto set my hand, the day and year placed opposite my signature.

Date	Name of Signer (Printed Name)	Residence	County
NR 6/12/13	Anthony J. Roman 100th Street Brooklyn, NY 11219	359 W 47 Borough of Manhattan, New York City	New York
6/12/13	Robert P. St.	342 W 49 St Apt 2C Borough of Manhattan, New York City	New York
6/13/13	Ann D. ... East Harlem	202 W 111 St Borough of Manhattan, New York City	New York
NR 6/13/13	Christina ... West Harlem	1928 W 111 St Borough of Manhattan, New York City	New York
6/13/13	C. ...	425 W 48 St Borough of Manhattan, New York City	New York
NR 6/13/13	BETSEY ... East Harlem	2011 W 55 St Apt 204 Borough of Manhattan, New York City	New York
6/13/13	Tom ...	355 W 57 St Borough of Manhattan, New York City	New York
6/13/13	James P. ... East Harlem	415 W 45 St Apt 4B Borough of Manhattan, New York City	New York
6/13/13	Yvonne ... East Harlem	792 9th Ave Apt 10 Borough of Manhattan, New York City	New York
6/13/13	...	744 8th Ave Borough of Manhattan, New York City	New York
6/13/13	...	305 W 52 St Apt 10 Borough of Manhattan, New York City	New York
6/13/13	...	348 W 55 St Borough of Manhattan, New York City	New York
6/13/13	...	470 W 55 St Borough of Manhattan, New York City	New York
6/13/13	...	4174 W 54 St Apt 1F Borough of Manhattan, New York City	New York
6/13/13	...	550 W 52 St Apt 4B Borough of Manhattan, New York City	New York

STATEMENT OF WITNESS

I, ROBERTA DOUGLAS, State: I am a duly qualified voter of the State of New York
(Print Name) and am an enrolled voter of the Democratic Party. I have signed at 375 W 42nd St Apt 4A
(Address) and am an enrolled voter of the Democratic Party. I have signed at 15 signatures subscribed the same in my presence
(Number of Signatures) on the dates and at the places indicated and identified himself or herself to be the individual who signed this sheet.
I understand that this statement will be accepted for all purposes as the equivalent of an attested writ, if it contains a material false statement
shall subject me to the same penalties as if I had been duly sworn.

Date: 6-29 2009
Signature of Witness: [Signature]

WITNESS IDENTIFICATION INFORMATION:
The following information must be completed prior to filing with the board of elections in order for this petition to be valid.

City: New York County: New York

Printed Name	Printed Name	Address	City
09/06/13 2009 Printed Name	H V I B JONES Jenna Moss	Borough of Manhattan, New York City	New York
NR 06/13 2009 Printed Name	Big League of Girl Scouts Gisela Rodriguez	404 W. 54 St Apt 8F	New York
06/13 2009 Printed Name	Carroll K. Albaroli	3912 W 50th St NY	New York
06/13 2009 Printed Name	C. Spallone	267 10th Ave NYC	New York
06/13 2009 Printed Name	Kelly Ticaenhagen Jelly Ticaenhagen	789th Ave 2A	New York
06/14 2009 Printed Name	Vendula Perry	441 West 50th St	New York
06/14 2009 Printed Name	William Howell WILLIAM HOWELL	790 W 46th St NYC	New York
06/14 2009 Printed Name	William Howell		New York
09/06/14 2009 Printed Name	Kenneth Jones Kenneth Jones	425 E 23rd St	New York
06/14 2009 Printed Name	Sheila A. Feener Sheila A. Feener	321 W 55th St #73	New York
NR 06/14 2009 Printed Name	Janet Korman	105 West 50th	New York
NR 06/14 2009 Printed Name	James McLeod		New York
NR 06/14 2009 Printed Name	Chae Pan	310 W 50th St	New York
NR 06/14 2009 Printed Name	George Gray	252 9th Ave	New York

STATEMENT OF WITNESS

Richard D'Ozella
(Name of Witness)
state: I am a duly qualified voter of the State of New York
and am an enrollee voter of the Democratic Party. I now reside at 375 W 48th St #4A New York, New York.
(Residence Address)

Each of the individuals whose names are subscribed to this petition sheet containing 14 signatures, subscribed the same by presence on the dates above indicated and identified himself or herself to be the individual who signed this sheet.

I understand that this statement will be accepted for all purposes as the equivalent of an affidavit and, if it contains material false statements, shall subject me to the same penalties as if I had been duly sworn.

Date 6-29 2009 [Signature]
Signature of Witness

WITNESS IDENTIFICATION INFORMATION:

The following information must be completed prior to filing with the board of elections in order for this petition sheet to be valid:
City New York County New York
SHEET NO. 7

Received Sep-01-2009 02:18PM From:000000000000 To:ROBERTS JACOBS GREIG Page 008

New York County New York State		
DENISE SPILLANE	Female Assembly District Leader from the 75th Assembly District Part B New York County New York State	400 West 43rd Street New York, New York 10018
	Member of the Democratic County Committee from the Election District of the 75th Assembly District New York County New York State	

I DO HEREBY APPOINT—

NAMES	ADDRESSES
MARY SHEILA	41 North Avenue, New York, NY 10019
JAMES SIMPSON	375 West 43rd Street, New York, NY 10018
THOMAS M. GREIG	305 West 40th Street, New York, NY 10018

All persons are enrolled voters of the Democratic Party, as a Committee to fill vacancies in accordance with the provisions of the Election Law in witness whereof, I have hereunto set my hand, the day and year placed opposite my signature.

Date	Name of Signer (Signature Required)	Residence	County
NR 6/22/2009 Printed Name	Josanna P...	Apartment 714 9th Ave Borough of Manhattan, New York City #2, N.Y.	New York
NR 6/22/2009 Printed Name	ROBERTA TERPILLO	MANHATTAN 12101 Borough of Manhattan, New York City	New York
NR 6/22/2009 Printed Name	ROBINNET PESSAUD	220 W. 49th St #2305 Borough of Manhattan, New York City	New York
NR 6/22/2009 Printed Name	Clayton	747 9th Ave 12th Borough of Manhattan, New York City	New York
NR 6/22/2009 Printed Name	Play J...	194 9 Ave IRS Borough of Manhattan, New York City	New York
6/22/2009 Printed Name	ROBERTA TERPILLO	317 W 54th St Room 1104 Borough of Manhattan, New York City	New York
6/22/2009 Printed Name	Maria B...	320 W 46th St NY 10018 Borough of Manhattan, New York City	New York
NR 6/22/2009 Printed Name	Lucia...	706 9th Ave 12th Borough of Manhattan, New York City	New York
NR 6/22/2009 Printed Name	Shil Hooks	877 102nd St #55 Borough of Manhattan, New York City	New York
NR 6/22/2009 Printed Name	J...	15 49th St 11a Borough of Manhattan, New York City	New York
6/22/2009 Printed Name	J. MARRIAGE	543 EIGHTH AVE Borough of Manhattan, New York City	New York
6/22/2009 Printed Name	BRIGGA YANKIN	532 W. 49th St. Borough of Manhattan, New York City	New York
6/22/2009 Printed Name	JOYCE VINES	989 9th Ave #1107 Borough of Manhattan, New York City	New York
6/22/2009 Printed Name	DESIKAT	315 W 54th St #18 Borough of Manhattan, New York City	New York
6/22/2009 Printed Name	CHRISTINE ALPER	320 W. 52nd St. #15 Borough of Manhattan, New York City	New York

STATEMENT OF WITNESS

I, Robert Greig (Name of Witness) do hereby certify that I am a duly qualified voter of the State of New York and am an enrolled voter of the Democratic Party. I now reside at 375 West 43rd St #44 (Residence Address) New York, New York.

Each of the individuals whose names are subscribed by this petition and containing signatures, subscribed the same in my presence on the dates herein indicated and identified himself or herself to be the individual who signed this statement and that this statement will be applied for as purpose as the equivalent of an affidavit and, if it contains a material false statement shall subject me to the same penalties as if I had been guilty thereof.

Date 6-29 2009 Richard Greig (Signature of Witness)

WITNESS IDENTIFICATION INFORMATION.

The following information must be completed prior to filing with the board of elections in order for this petition sheet to be valid.

City New York County New York

Received Sep-01-2009 03:15pm From-000000000000 To-ROBERTS JACOBS GREIG Page 006

DENISE SPILLANE	New York County New York State	400 West 43rd Street New York, New York 10019
	Female Assembly District Leader from the 78th Assembly District Part B New York County New York State	
	Member of the Democratic Citywide Committee from the 78th Assembly District of the 78th Assembly District New York County New York State	

I DO HEREBY APPOINT: NAME: MARY DYER A, JAMES BRIMSON, THOMAS M. DRISCOLL ADDRESS: 747 TENTH AVENUE, NEW YORK, NY 10019, 375 West 40th Street, New York, NY 10006, 349 West 48th Street, New York, NY 10019

I, the undersigned, do hereby certify that the foregoing is a true and correct copy of the names and addresses of the individuals who have signed this petition in support of my signature.

NR 6/23/09	<i>[Signature]</i>	747 Tenth Ave NYC	New York
NR 6/23/09	<i>[Signature]</i>	246 9th Ave NYC	New York
NR 6/23/09	<i>[Signature]</i>	330 West 57 St NYC	New York
NR 6/23/09	<i>[Signature]</i>	330 West 57 St NYC	New York
NR 6/23/09	<i>[Signature]</i>	310	New York
NR 6/23/09	<i>[Signature]</i>	746 9th Ave NYC	New York
NR 6/23/09	<i>[Signature]</i>	746 9th Ave NYC	New York
NR 6/23/09	<i>[Signature]</i>	246 9th Ave NYC	New York
NR 6/23/09	<i>[Signature]</i>	246 9th Ave NYC	New York
NR 6/23/09	<i>[Signature]</i>	424 W 57th St NYC	New York
NR 6/23/09	<i>[Signature]</i>	330 W 56th St NYC	New York
NR 6/23/09	<i>[Signature]</i>	651 9th Ave NYC	New York
NR 6/23/09	<i>[Signature]</i>	435 W 57th St NYC	New York
NR 6/23/09	<i>[Signature]</i>	435 W 57th St NYC	New York

STATEMENT OF WITNESS

I, RICHARD J. CORNIELLA, do hereby certify that the foregoing is a true and correct copy of the names and addresses of the individuals who have signed this petition in support of my signature.

I, the undersigned, do hereby certify that the foregoing is a true and correct copy of the names and addresses of the individuals who have signed this petition in support of my signature.

City: New York County: New York

9

FROM: A. JOSHUA EARLICH, ESQ
518-334-1502

TO: JON. RONALD UZIENSKI APP. DIV. 1ST DEPARTMENT
212-213-5136

ARTHUR W. GREIG., ESQ - APPELLANT
212-274-0109

STEVEN H. RICHMAN, ESQ - RESPONDENT
212-487-5342

MARTIN E. CONNOR, ESQ
718-875-6044

~~APPELLANT~~ PETITIONER/
RESPONDENTS BRIEF 18 PAGES to
Follow

LEWIS v HUMMEL

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GENERAL COUNSEL
BO. OF ELECTIONS
IN THE CITY OF NEW YORK

To be argued by: A. Joshua Ehrlich, Esq.
Time Requested: 15 Min.

**STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION – FIRST DEPARTMENT Docket No. _____**

In the Matter of the Application of

ANNA R. LEWIS

Petitioner-Candidate/Aggrieved-Respondent

-against-

LYDIA HUMMEL

Respondent-Appellant

-and-

**THE NEW YORK CITY BOARD OF ELECTIONS
Respondent-Respondent.**

NEW YORK COUNTY INDEX No. 111509/2009

BRIEF FOR RESPONDENT ANNA R. LEWIS

A. Joshua Ehrlich, Esq.
Of Counsel to Martin E. Connor
Attorney for Anna R. Lewis
61 Pierpont Street
Brooklyn, NY 11201

A. Joshua Ehrlich, Esq.
Office: 71 Grove Ave.
Albany, NY 12208
Mailing Address
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Albany, NY 12224
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2009 SEP -4 PM 12:56

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CD. OF ELECTIONS
IN THE CITY OF NEW YORK

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QUESTIONS PRESENTED

1. Did the referee err in invalidating 207 signatures on inaccuracies in the witness identification information below the witness statement that contained the correct address of the witness?

The Court below answered in the Affirmative and reversed the referee based upon case law.

2. Did the referee err in invalidating 39 signatures of the witness D'Ornellas altered witness statement.

The Court below Answered in the Affirmative based upon his consistent and uncontroverted testimony.

STATEMENT OF FACTS

Petitioner Anna Lewis filed a designating petition naming her as a candidate for Judge of the Civil Court of the City of New York from the 3rd Municipal Court District, New York County. The Respondent filed General Objections and Specifications against this designating petition. At a hearing on August 5, 2009, the Board of Elections did not adopt its Clerks' Report, sending the matter back to the Manhattan Borough Office for further review. On August 11, 2009 (not August 10 as stated in the Referee's Report) the Board of Elections adopted a revised

Clerks' Report showing the designating petition to have only 1166 valid signatures. Petitioner commenced the instant validating proceeding within the three days after the Board ruling as specified in the Election Law. Respondent-Objector **did not commence an invalidating** proceeding.

In his Report and Recommendation, the Special Referee recited that he had, by his rulings, restored 110 signatures as valid. After mathematical corrections to the Referee's report, the Court concluded there were 1256 valid signatures before the Court ruled on the Witness Identification issue and the 5 pages of altered witness statements.

On August 27, the Hon. Edward H. Lehner, J.S.C., issued a Decision and Order restoring 207 signatures based upon the relevant case law validating incomplete or incorrect witness identification information and 39 signatures witness by Richard D'Ornellas on five sheets. Mr. D'Ornellas testified at the hearing and his testimony was uncontroverted. Based upon the Court's Decision, the Petitioner/Respondent was restored to the ballot for the September 15, 2009 Democratic Primary election with 1502 valid signatures.

ARGUMENT

POINT I

THE COURT CORRECTLY VALIDATED 207 SIGNATURES BASED ON THE HOLDINGS OF CONTROLLING APPELLATE DIVISION DECISIONS

All of the numerous sheets collected by 10 subscribing witnesses were invalidated by the Board of Elections on the grounds that the pre-printed county in the Witness Identification Statement on the sheets states "New York". However, in every case, the subscribing witnesses correctly set forth the county of their residences in the witness statement and initialed the change from the pre-printed form. (The record is not clear as to the witnesses, but the Bill of Particulars sets forth the names of the various witnesses besides Mr. Gray). These sheets contain 207 otherwise valid signatures.

Section 6-132 (2) of the Election Law sets forth the form and the information that are to be contained in the subscribing witness statement of a designating petition and the Witness Identification Statement. The subsection of the statute states, *inter alia*, "The form of such statement shall be substantially as follows...." [Emphasis added].

The Court clearly understood the intention of . The Election Reform Act of 1992 (Ch. 79 of the Laws of 1992) first provided for a "Witness Identification

Statement”(hereinafter “WID”) containing the town or city and the county wherein the witness resides below the signature line in the subscribing witness statement.

Subsequent to its adoption, a case arose wherein the subscribing witnesses failed to set forth the county (borough) in their address in the actual witness statement. The court held that the sheets were valid based on the statement of the county in the WID. Rivera v. Loeb, 196 AD2d 617 (2d Dept. 1993). This case sanctioned the reverse fact pattern to the instant one and implicitly applied a “substantial compliance” standard.

That same year, another case was decided concerning the failure to state the county and city or town in the actual witness statement. The court articulated the lesser standard of required compliance brought about by the 1992 reforms that added the WID. Invoking the substantial compliance standard, the court held the petition sheets to be valid. Barrett v. Brodsky, 196 AD2d 603 (2d Dept.), leave denied, 82 NY2d 653 (1993).

The next line of cases dealt with the failure to include the town or city and the county in the WID. The Second Department held the failure to provide the WID information was insufficient to warrant invalidation of the petition sheets, particularly where the complete address of the subscribing witness was set forth elsewhere on the page. Berkowitz v. Harrington, 307 AD2d 1002 (2003).

In Arcuri v. Hojnacki, the failure of the subscribing witness to correctly set forth his town or city in the WID was held insufficient reason to invalidate the sheets where the witness had correctly set forth the information elsewhere on the sheet (i.e., in the actual witness statement). 32 AD3d 658 (3d Dept.), leave denied, 7 NY3d 707 (2006).

In a case where the WID incorrectly set forth the subscribing witness' town of residence, but the subscribing witness had correctly stated it in the actual witness statement, the court held the petition sheets to be valid. Curley v. Zacek, 22AD3d 954 (3d Dept.), leave denied, 5 NY3d 714 (2005).

The Fourth Department recently held that inclusion of incorrect WID information when the correct information is contained in the witness statement does not invalidate the petition sheets. Powers v. Kozlowski, 54 AD3d 540 , leave denied, 11 NY3d 701 (2008)..

In fact, this is second time the Supreme Court, First Department, First District in Pagan v. Board of Elections, NY County Index No. 111029/2006 ruled identically to the decision in this case (copy attached).

It is clear from the caselaw that the more lenient "substantial compliance" standard is the measure to be used in evaluating compliance with the WID requirements. The instant case fits squarely into the factual situation addressed by the cases cited.

It is well known that the Second, Third and Fourth Departments tend toward stricter compliance in Election Law matters in comparison with the First Department. The decisions of other Departments, and of the Supreme Court, New York County should control in this instance and this Court should Affirm the lower Court and continue this ballot access reform.

Therefore the decision of the lower Court should be affirmed.

POINT II
THE COURT CORRECTLY CREDITED
THE UNREBUTTED TESTIMONY
OF SUBSCRIBING WITNESS D'ORNELLAS

The Board of Elections invalidated 39 signatures on 5 sheets witnessed by Richard D'Ornellas on the grounds of "Alteration". On each of the sheets a signature purporting to be Leonard Kane's (as subscribing witness) was crossed out and initialed by D'Ornellas and his name (D'Ornellas') was signed as the subscribing witness. See, Grancio v. Coveney, 60 NY2d 608.

Mr. D'Ornellas testified that he had made the alteration because someone (not Kane) had signed Kane's name in a mistaken effort to help Mr. Kane who could not sign his sheets due to a stroke. D'Ornellas clearly testified that he was present with Kane when each of the signatories signed the petition on each of the

dates indicated on the sheets. Or in short. Mr. D'Ornellas corrected a fraud. He did not commit one.

While the cross examination produced some disjointed back and forth, Mr. D'Ornellas did not deviate from his testimony that he in fact witnessed all the signers affix their signatures on the dates placed on the petition sheets.

Granting that Mr. D'Ornellas was not the most articulate witness, there was not an iota of evidence introduced to refute his testimony. Indeed, the Referee ruled his signatures invalid before the witness even stepped down.

A reading of the testimony (August 18 transcript, pp 29-44) demonstrates that there was simply no basis for the Referee's ruling. See, Sole v. Draffin, 78 AD2d 573 (4th Dept. 1980). Additionally, the alterations here have been sufficiently explained and the pages must be validated. McGuire v. Gamache, 5 NY3d 444 (2005).

Accordingly the Decision below should be Affirmed.

POINT III

**IN THE ABSENCE OF AN INVALIDATING
PROCEEDING IT WOULD BE ERROR
TO INVALIDATE SIGNATURES FOUND
VALID BY THE BOARD**

The seminal case of *Suarez v. Sadowski* adopted a procedural rule that had previously prevailed in the First Department (but not elsewhere) in holding that, in the absence of a properly commenced validating proceeding or a timely counterclaim to validate, the Respondent in an invalidating proceeding was precluded from challenging Board of Elections rulings of invalidity of signatures. 48 N.Y.2d 620 (1979).

Adherence to this precedent has kept from the ballot many candidates who were unable to contest Board rulings of invalidity while their adversaries were able to have Board rulings of validity overturned in court. *Rodriguez v. Nieves*, 242 A.D.2d 350; *Henry v. Blake*, 207 A.D.2d 508; *Dickerson v. Daly*, 196 A.D.2d 610; *Jackson v. Stevens*, 185 A.D.2d 960; *Gadsen v. Board of Elections*, 57 N.Y.2d 751; *Starr v. Board of Elections*, 89 A.D.2d 991; *Ford v. D'Apice*, 133 A.D.2d 191; *Krueger v. Richards*, 59 N.Y.2d 680.

Of course, the rule of *Suarez v. Sadowski* applies in reverse. In *Ramos v. Lawson*, 298 A.D.2d 610, the Appellate Division restored the candidate to the ballot in a validating proceeding by reversing the lower court's rulings on 36 individual signatures and precluding the objectors from presenting a challenge to any other signatures:

“The argument raised by the objectants ... regarding

their alleged right to present evidence as to the
invalidity of certain signatures not invalidated by the
Board of Elections is not before this Court because
the objectants did not file a petition to invalidate....”
(citing Suarez v. Sadowski). Id., at 611.

Boards of Elections invariably make errors in their rulings on specifications. Correction of such errors is precisely why the Election Law provides for *de novo* review of such rulings by means of validating and invalidating proceedings. Sometimes the erroneous Board rulings are merely mathematical errors. Other errors are qualitative in that the Board makes inaccurate rulings on voter registrations and the like. Sometimes the Board fails to make any rulings on some specifications. These errors usually cut both ways -for and against the candidate.

Correction of all these Board errors is precisely the reason for invalidating and validating proceedings.

One of the more extreme examples of Board errors is found in Elwood v. Jackson, 207 A.D.2d 507, wherein the Board invalidated the same 10 signatures twice. Invoking Suarez v. Sadowski, the court held the candidate bound by such an erroneous Board rulings because he had not commenced a validating proceeding.

In a 2005 New York County case, the Special Referee's Report did not apply the Suarez precedent based on the petitioner's stipulation that the petition would not contain sufficient signatures should objectors be permitted to go forward in invalidating signatures.

The Supreme Court, by Justice Silberman, disaffirmed the Report of the Special Referee holding the Objector was not permitted to revisit rulings made by the Board in the absence of an invalidating proceeding. Marcial v. Ruiz (Index No.110801 /05). The First Department affirmed Justice Silberman's decision. 21 A.D.3d 319 (2005).

The Appellant in this matter pressed the Court below and is insisting that this Court invalidate signatures on grounds that were not specified in their objections. Additionally, they ask this Court to invalidate signatures that have been found valid without availing themselves of their opportunity to commence an invalidating proceeding. Without an invalidating proceeding, they are estopped from raising issues against signatures found to be valid at the Board and in Court.

Accordingly, the decision bellow should be Affirmed.

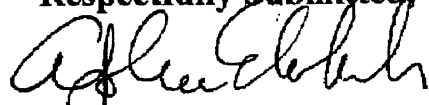
CONCLUSION

The Decision of the Court below should be affirmed.

Dated: Albany, NY

September 4, 2009

Respectfully Submitted,



A. JOSHUA EHRLICH, ESQ.

Attorney for Respondent Lewis
Mailing Address
P.O. Box 7273
Capitol Station
Albany, NY 12224
(518) 334-1502

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: ELECTION PART 88R

-----X

In the matter of the application of

JUAN PAGAN,

Candidate

Index No. 111029/2006

-against-

THE BOARD OF ELECTIONS OF THE CITY
OF NEW YORK

-and-

REFEREE'S REPORT

GARY TILZER and MICHAEL FARRIN,

Objectors/Respondents

For an Order pursuant to Sections 16-100, 16-102 and 16-116 of the Election Law, Declaring valid the designating petitions purporting to designate the Respondent-Candidate for the Public Office of member of Assembly from the 74th Assembly District, New York County, New York in the Democratic Party Primary Election to be held September 12, 2006, and to order the said BOARD OF ELECTIONS to print and place the name of said Candidate upon the official ballots of such primary election.

-----X

TO THE SUPREME COURT, NEW YORK COUNTY, ELECTION TERM, PART 50:

By oral directive of Hon. Jacqueline W. Silbermann, J. S. C. made yesterday, August 10, 2006, the issues raised by the petition to validate the designating petitions of Juan Pagan

were referred to me to hear and report.

I held a hearing on the referred issue(s) yesterday. Mr. Pagan was represented by counsel. Respondents/Objectors Gary Tilzer and Michael Farrin were self-represented. Transcription of the hearing minutes was waived for purposes of this report. The exhibits are enclosed herewith.

Mr. Pagan requires 500 valid signatures from duly registered Democratic Party voters in order to obtain ballot status. Originally, the Clerk's Report at the Board of Elections (Petitioner's exhibit 1) found that Mr. Pagan had 569 signatures, more than sufficient to obtain a place on the ballot. However, upon application of objector Gary Tilzer, the "specs" were reworked and 135 of the signatures previously found to be valid were invalidated, leaving Mr. Pagan with 434 valid signatures, (Amended Clerk's Report, Petitioner's exhibit 2), insufficient to achieve ballot status. Mr. Pagan brought on the captioned petition to validate to reverse that holding.

These signatures were invalidated due to a common alleged defect. All of the invalidated signatures were witnessed by one subscribing witness, Gregory John Fischer. These signatures appear on sheets 15, 21, 22, 23, 24, 31, 32, 38, 39, 40, 50, 52, 53, 57, 71, 72, 81, 89, 92, 97, 99, 100, 107 and 109 of the designating petition.

Among other things, the "STATEMENT OF WITNESS" section appearing at the bottom of each page of the designating petition requires that the name and current address of the subscribing witness, and the number of signatures appearing on that page, be provided. It

also requires, at the bottom of the page, beneath the space provided for the signature of the witness and the date, space for "WITNESS IDENTIFICATION INFORMATION". The legend appearing states "The following information must be completed prior to filing with the board of elections in order for this petition sheet to be valid." Underneath that statement, are the words "City" and "County". The City and County are both pre-printed as "New York". A copy of sheet 100, received in evidence as Tilzer Exhibit A, is attached hereto for the more ready reference of the Court.

Mr. Fischer, who was the sole witness, testified that he filled in the information in the witness statement of each of the pages. However, he does not live in New York City or New York County. He lives in Calverton, New York, which is in Suffolk County. A witness who resides outside of the City of New York is required to include his county of residence in the witness statement, as well as the city or town of his residence. Election Law Section 6-130. Mr. Fischer crossed out "New York" in the statement, without initialing the change, and simply indicated that he lives in "Calverton," New York without also indicating that he resides in Suffolk County. He did not make any changes to the Witness Identification Information appearing on the bottom of the form to bring that provision of the form into conformity with his Suffolk County address.

I note that the informational requirements of this lower portion of the form are inherently oblique and confusing. Mr. Fischer has been a petition bearer on only one previous occasion, although he does not appear to be a political novice. His testimony as to

the regularity of his procedure while gathering signatures was completely credible and unimpeached. The worst fault the objectors were able to elicit was that on some of the pages, Mr. Fischer inscribed his middle initial, and on other pages, he used his full middle name, "John".

So the question thus becomes, was the Board of Elections correct in invalidating the petition sheets enumerated above?

In *Matter of Berkowitz v Harrington*, 307 AD2d 1002 (2d Dept 2003), the Appellate Division, Second Department held that the failure to include in the Witness Identification Information section of the petition the town or city and county of the subscribing witness was insufficient, in and of itself, to warrant invalidation of the petition, where the complete address of the subscribing witness appeared elsewhere on the same page of the petition – as it does here. Mr. Fischer's name and address (including his zip code) are printed at the top of the form, inasmuch as he is a member of the committee to fill vacancies.

In *Matter of Curley v Zacek*, 22 AD3d 954 (3d Dept), *lv denied* 5 NY3d 714 (2005), the Appellate Division, Third Department held that a similar omission was not substantive, especially where "the narrow violation at issue does not give rise to the possibility or inference of fraud..." Mr. Fischer's testimony at the evidentiary hearing, giving his reasons for the changes and the omissions, fulfilled the requirement of *McGuire v Gamache*, 5 NY3d 444 (2005), to the effect that the alterations be explained.

I find that respondent Board of Elections' action in invalidating Mr. Pagan's

designating petition is contrary to law. Inasmuch as restoration of the pages witnessed by Mr. Fischer results in the numerical sufficiency of the designating petition to attain ballot status, I recommend that the Court grant the candidate's petition to validate, and that the Court direct the Board of Elections to place Mr. Pagan's name on the ballot for the primary election scheduled for September 12, 2006.

Dated: August 11, 2006

Respectfully submitted,

Marian Lewis, Special Referee