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

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In the Matter of the Application of
MARIO M. CASTRACAN and VINCENT F. BONELLI,
acting Pro Bono Publico,

SUPPORTING AFFIDAVIT

Petitioners-Appellants,

Albany County Clerk's
Index No. 6056/90

for an Order, pursuant to Sections
16-100, 16-102, 16-104, 16-106 and
16-116 of the Election Law,

Appeal No. 62134

-vs-

ANTHONY J. COLAVITA, Esq., Chairman,
WESTCHESTER REPUBLICAN COUNTY COMMITTEE,
GUY T. PARISI, Esq., DENNIS MEHIEL, Esq.,
Chairman, WESTCHESTER DEMOCRATIC COUNTY
COMMITTEE, RICHARD L. WEINGARTEN, Esq.,
LOUIS A. BREVETTI, Esq., Hon. FRANCIS A.
NICOLAI, HOWARD MILLER, Esq., ALBERT J.
EMANUELLI, Esq., R. WELLS STOUT,
HELENA DONAHUE, EVELYN AQUILA, Commissioners
constituting the NEW YORK STATE BOARD
OF ELECTIONS, ANTONIA R. D'APICE,
MARION B. OLDI, Commissioners constituting
the WESTCHESTER COUNTY BOARD OF ELECTIONS,

Respondents-Respondents,

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STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss.:

DORIS L. SASSOWER, being duly sworn, deposes and says:

1. I was acting on behalf of Doris L. Sassower, P.C., until June 19, 1991 as pro bono counsel to Petitioners-Appellants in this proceeding from its inception through and including the Decision of the Court dated May 2, 1991 (Exhibit "A") and the Order dated May 15, 1991 (Exhibit "B").

2. On June 19, 1991, I was served with an Order of the

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Appellate Division, Second Department, dated June 14, 1991, suspending me from the practice of law, without any statement of reasons or findings, as required by law and without any evidentiary hearing having been had. Such suspension Order was issued five (5) days after it was announced in the New York Times that my firm would seek to take the case up to the Court of Appeals. I have reason to believe my aforesaid suspension was a direct retaliation for my representation of Appellants in these proceedings and to thwart any further appellate review of this matter seeking to challenge cross-endorsements as a way of electing judicial candidates generally and, in particular, under the Three-Year Deal in question.

3. As a result of the suspension Order, I am no longer acting as counsel to Appellants. Moreover, my firm has signed a Consent to Substitution of attorney so that it is no longer attorney of record.

4. I, therefore, submit this Affidavit not as attorney of record but as an individual with personal knowledge of material facts, in support of Appellants' motion for reargument and renewal of the appeal herein, and for recusal, or, alternatively, for leave to appeal to the Court of Appeals.

5. At the outset, it must be stated that that Respondents did not give Appellants' notice either by Notice of Appeal or Cross-Appeal or in their "Questions Presented" that they were not accepting Justice Kahn's approach that the technical objections of both sides would not be considered by

this Court. Nor were Appellants given an opportunity by the Court to supplement the Record with pertinent facts, when it decided this appeal on Respondents' procedural objections. All of the individual Respondents were in default in the lower court by virtue of their untimely and/or unverified responding papers to Appellants' Order to Show Cause and had no standing to raise their procedural objections until relieved of their default.

6. Concerning the non-joinder objection adopted by the Court, it should be noted that before this proceeding was commenced, I spoke on several occasions with Thomas Solezzi, Esq., counsel to the New York State Board of Elections, as well as to John Ciampoli, Esq., his Deputy Counsel. They advised me that there was no need to serve the Attorney-General, since it was his standard and customary practice to defer his jurisdiction to the public agency involved when it has its own counsel, such as the New York State Board of Elections does. He promised that I would receive a letter confirming such waiver of service by the Attorney General's Office, and further that he would not raise any objection to the omission of service on the Attorney-General.

7. When I thereafter served papers on the Attorney-General in connection with the preference application, since I had not yet received Mr. Ciampoli's promised confirmation, I finally did receive a letter from him dated October 31, 1990, with copies to all counsel, confirming that service upon the Attorney-General was waived and that no further service of papers on the Attorney-General should be made (Exhibit "C").

Additionally, in accordance with our understanding, Mr. Ciampoli never raised any objection based on failure to serve the Attorney-General as a ground of dismissal, either by motion to dismiss or in its filed Answer (R. 127). Under those circumstances, there is no prejudice to Respondents. Nor is it fair or just that this Court should dismiss the proceeding as against all the Respondents, when the public agency for whose protection that objection was created, does not object and the Attorney-General himself expressly waived service upon him.

8. On October 15, 1990, I orally argued in support of the Petition herein. Although I had requested a hearing, and was told previous thereto by Justice Kahn's Law Secretary that the judge had cleared his calendar to permit a hearing after argument was had, His Honor did not inform us until after the argument that he had to take a criminal matter at 12 noon, and would not hold the hearing that day. My recollection is that after arguments were presented by all counsel, Justice Kahn further announced that he would not get into a procedural hassle, nor would he rule on my objection that the individual Respondents were in default nor the Respondents' technical objections, including non-joinder of necessary parties, but that since the case was headed for the Court of Appeals, he would try to accomodate Respondents' urgent demand for a speedy decision by getting to "the heart of the matter" promptly.

9. As aforementioned, Respondents did not appeal the propriety of Justice Kahn's specifically deciding <u>not</u> to rule on

Appellants' objection that Respondents' default precluded their raising their procedural objections.

10. With respect to the omitted contested candidates, Joan Lefkowitz and George Roberts, I am annexing hereto a copy of the Affidavit of Service showing service upon both of them of the Specifications of Objections (Exhibit "D"), thereby affording them do and timely notice.

11. In view of the fact that this proceeding was publicized from the outset, there can be no question as to their actual knowledge and awareness thereof--affording them the opportunity to intervene had they felt they would be inequitably affected by this proceeding.

12. Moreover, as to Respondents, I specifically stated on numerous occasions that I would make no objection to intervention by anyone or their impleading any omitted parties they deemed necessary. No intervention or impleader was ever sought by anyone.

13. As to the instant recusal request based on bias, the record should reflect the fact that on Friday afternoon, March 22, 1991, I telephoned Michael Novak, Clerk of the Court for the Appellate Division, Third Department. I specifically asked him whether any of the members of the bench assigned to hear the appeal on Monday, March 25, 1991 were themselves cross-endorsed. He stated he did not know the answer to that question. Because of my desire to avoid public embarassment to members of the panel at the time of my argument, I asked him if he would

ascertain that information for me in advance thereof. He stated he would convey my concern to the Presiding Justice, and I asked him to let me know if the answer was in the affirmative.

14. I did not hear further from Mr. Novak prior to the oral argument on Monday, March 25, 1991, and proceeded to argue the appeal herein, without knowledge of the fact--discovered the day following the May 2, 1991 Decision came down from this Court--that three out of the five members of the panel hearing argument on the legality of cross-endorsements were themselves cross-endorsed. Indeed, the Presiding Judge had been triple cross-endorsed--by the Republican, Democratic and Conservative Parties. Annexed as Exhibit "E" to these motion papers are copies of the official records of the New York State Board of Elections reflecting the cross-endorsements of the various judges who were involved in this appeal, as well as the denial of Appellants' formal motion for the preference to which they were entitled under the Election Law and the Court's own rules.

15. There was no disclosure by any member of the bench hearing such appeal of such information, notwithstanding that, under Canon 3(C)(1) of the Code of Judicial Conduct, "a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned".

16. As shown by the annexed letters from and to the Clerk of this Court (Exhibits "F" and "G"), it was Presiding Justice Mahoney who decided that the case would not be given the normal and required preference for Election Law cases, and that a

formal application for the preference had to be made to the Court.

17. Prior thereto, following Mr. Novack's telephone notification on October 18, 1990, that the oral argument of the appeal scheduled for the next day had been cancelled, without explanation, I had spoken to Justice Casey, the judge on duty that day, to inquire whether he would sign an Order to Show Cause so that the case could be heard before Election Day.

18. Justice Casey stated he would not sign my Order to Show Cause, that a formal motion was not necessary, and that furthermore, I was wasting the Court's time because it was "written in stone" that "no preference" would be granted to this proceeding.

19. Justice Casey also sat as a member of the panel which denied the preference application. The records of the New York State Board of Elections showing that of the five judges who denied Appellants' formal preference application, all were themselves cross-endorsed are annexed as "Exhibit "E". Justices Kane and Weiss had been quadruple cross-endorsed by the Republican, Democratic, Conservative, Liberal parties; Justice Casey had been triple cross-endorsed by the Republican, Democratic, Conservative parties; Justice Mikoll had been triple cross-endorsed: Democratic, Liberal, and Conservative parties. Justice Mercure had been double cross-endorsed by the Republican and Conservative parties.

20. Appellants' preference application, extensively detailing and documenting the foregoing, is part of the Court's records herein, incorporated herein by reference. It is respectfully submitted that the same should be carefully reviewed in connection with the instant application for recusal.

DORIS L. SASSOWER

Sworn to before me this
25th day of July 1991

Notary Public

ELI VIGLIANO
Notary Public, State of New York
No. 4997383
Qualified in Westchester County
Commission Expires June 4, 1992