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

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

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.

MEMORANDUM OF LAW OF PETITIONERS-APPELLANTS IN SUPPORT OF THEIR MOTION TO REARGUE OR, ALTERNATIVELY, FOR PERMISSION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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PRELIMINARY STATEMENT

By reason of the serious and substantial errors of this Court, Petitioners-Appellants ("Appellants") herein move for an order: (1) granting leave to reargue and renew their appeal from the lower court's Decision/Order entered October 17, 1990, affirmed by the Appellate Division, Third Department, on other grounds, by Decision dated May 2, 1991 ("Decision") [Exhibit "A"[1]] and Order entered May 15, 1991 ("Order") (Exhibit "B"); (2) for leave to join absent parties, if deemed necessary by this Court, and to amend their Petition accordingly; (3) for recusal, or, alternatively, for leave to appeal to the Court of Appeals[2]; and (4) for such other and further relief as the Court may deem just and proper.

Appellants, citizen objectors acting pro bono publico, seek to undo an offense against the public trust, the New York State and Federal Constitutions, and the Election Law of the State of New York.

This case arose as an Election Law proceeding--entitled to be heard before Election Day 1990. Due solely to this Court's

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[1] All Exhibits referred to herein are annexed to the Supporting Affidavit of Doris L. Sassower, sworn to July 25, 1991.

[2] Petitioners submit this motion without prejudice to their contention that their appeal lies as a matter of right to the Court of Appeals because of the substantial constitutional issues involved relative to the people's right to elect their Supreme Court, and Surrogate Judges--as provided in the New York State Constitution. Petitioners have already duly filed their Notice of Appeal and Jurisdictional Statement with the Court of Appeals.

denial of the preference to which the matter was entitled[3], it came before the Court for adjudication after the election. Accordingly, pre-election exigencies do not bar such joinder, interpleader, or intervention as may be thought necessary by the Court or justify dismissal of the Petition for any curable technical defects. Time pressures concomitant to obtaining resolution on the merits before Election Day no longer preclude amendment of the Petition to name additional parties or to modify the relief to accommodate the changed post-election circumstances, including possibility of severance or of converting this special proceeding into an action, which the Court may do "at any time" (CPLR 407)[4].

The lower court itself readily recognized that the transcendent public interest issues involved in the practice of cross-endorsements are "of substantial concern among various segments of the voting public" (R. 5). This case offers more than an opportunity to address overriding issues in the abstract. Rather, it is an imperative to decisive adjudication on the merits since the issues affect the lives, liberty, and property interests of one million and a half residents in the Ninth

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[3] Election Law, Sec. 16-116, "The proceedings shall have preference over all other causes in all courts"; the Rules of the Appellate Division, Third Dept. Sec. 800.16, "Appeals in election cases...shall be given preference".

[4] See also, CPLR 103(c) "...a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form..."); see also, CPLR 104 "the civil practice law and rules shall be liberally construed to secure the just, speedy, and inexpensive determination of every civil judicial proceeding."

Judicial District. In view of the continuing long-term injury to all such persons individually, as well as the public interest in preserving the sanctity of the franchise--and the integrity and independence of the judiciary--this Court should promptly correct the injustice represented by the unwarranted and drastic dismissal of this proceeding.

STATEMENT OF FACTS

In 1989, the executive committees of the Republican and Democratic County Committees for the five counties comprising the Ninth Judicial District put in writing an agreement arrived at between party leaders, adopted in resolution form, whereby both major parties agreed to a bartering of seven (7) judgeships, by nomination of identical candidates over a three-year period, covering the 1989, 1990, and 1991 elections ["cross-bartering contract"]. The two major parties and their hand-picked judicial nominees (specifically named in the resolution (R. 52-53)) agreed that, in exchange for "cross-endorsements" guaranteeing their uncontested election, the judicial nominees would consent to certain terms and conditions, including, inter alia, early resignations to create additional vacancies, as well as a pledge to split judicial patronage, as recommended by "the leaders of each major political party." (R. 53)

In 1990, Respondent Albert J. Emanuelli ["Emanuelli"], a Republican, then sitting on the Supreme Court bench, as a result of the 1989 cross-endorsement agreement (R-52-53), resigned his fourteen (14) year term after seven (7) months in

office, to run, as scheduled, with the endorsement of both major parties, for the Westchester County Surrogate judgeship. In return, Respondent Francis A. Nicolai ["Nicolai"], a Democratic County Court judge, pursuant to the 1989 agreement, was cross-endorsed by the two major parties, for the Supreme Court seat vacated by Justice Emanuelli.

This proceeding concerns the 1990 nomination of Respondents Emanuelli and Nicolai, both now sitting judges by implementation of the second phase of the three-year cross-bartering contract, as well as the nomination of Respondent Howard Miller, also now sitting as a Supreme Court judge under a further cross-endorsement bartering deal implemented at the same 1990 judicial nominating convention.

In addition to the foregoing written cross-bartering contract which Appellants, representing the public interest, contend should be declared illegal, unethical and against public policy, the Record on Appeal contains unrefuted evidence of Election Law violations at the conventions at which the cross-endorsed judicial candidates in the 1990 election were nominated (R. 55-76)--totally ignored by this, as well as the lower court.

Indeed, despite the uncontroverted existence of an agreement contravening the people's right to "elect" their Supreme Court and Surrogate judges, and the unrefuted documentary evidence of fraud and other Election Law violations at the 1990 judicial nominating conventions, this Court affirmed the lower court's dismissal--although not its reasoning.

The lower court had cast aside all technical and procedural objections--raised by both sides--stating it was granting "Respondent Parisi's motion to dismiss the Petition for failure to state a cause of action" (R. 7). Although a dismissal motion relates solely to the legal sufficiency of the pleaded allegations, Justice Kahn, instead, expressly based it on a finding that "there is no proof that the judicial conventions at issue were not legally organized, with a quorum present, and that a majority of that quorum duly voted for the candidates named as respondents hereto" (emphasis added) (R. 7). Since Justice Kahn had not afforded Petitioners an evidentiary hearing, and the Record before him contained uncontradicted Affidavits of three (3) eyewitnesses at the conventions attesting to the contrary (R. 55-76), the only way to explain Justice Kahn's ruling is that he treated Respondent Parisi's motion to dismiss as a motion for summary judgment. It is settled law that such action, without adequate notice to the parties, would have been impermissible. CPLR 3211(c); See also, Mihlovan v. Grozavu, 72 N.Y.2d 506 (1988).

Although characterized by this Court's Decision as a dismissal "on the merits", Justice Kahn's decision did not address the broad issue of the perniciousness of major party cross-endorsement agreements in general, or of the particular cross-bartering contract in question, or of the fraud and other Election Law abuses which took place at the judicial nominating conventions.

This Court's Decision is completely silent as to the lower court's aforesaid unsupported and incomprehensible finding on which it premised its dismissal, and equally silent as to the lower court's failure to apply the proper standard on motions to dismiss--one not dependent upon "proof", but on acceptance of the truth of the pleaded allegations and all inferences flowing therefrom, giving them "their most favorable intendment" Mihlovan v. Grozaru, supra.

This case was orally argued on March 25, 1991 and decided on May 2, 1991. In affirming Justice Kahn's dismissal, albeit on procedural grounds, this Court gave two reasons: (1) that Appellants had failed to join necessary parties; and (2) that Appellants had failed to serve the Attorney General. As shown hereinbelow, neither ground supports dismissal of the Petition.

Although this Court's Decision expressly acknowledges that only "[t]wo of the respondents moved to dismiss the petition", only one--Defendant Miller--moved on the ground of non-joinder, presumably under CPLR 3211(10). Nonetheless, this Court affirmed the lower court's dismissal of the case as against all Respondents.

For reasons set forth hereinbelow, Appellants respectfully ask this Court (a) to grant reargument on the ground that it overlooked material facts and applicable law requiring it to vacate the dismissal as against all Respondents, other than Respondent Miller, since they did not move for dismissal on the

ground of non-joinder of necessary parties; and to vacate the dismissal as against Respondent Miller, since he, like the other individual co-Respondents, had no standing to raise any technical defenses or make motions until they were relieved of their default[5]; (b) to vacate the dismissal on the ground that it misapplied the law of joinder (Point II); (c) to grant renewal relative to the claimed ground of lack of service on the Attorney General because the Court was unaware of certain material facts as to such service, i.e., that the Attorney General had expressly waived service (Exhibit "C")--and the New York State Board of Elections expressly stated it would not raise such objection--and, in fact, it did not do so either by motion or in its answer.

As applicable law and the interests of justice require, this Court should grant Petitioners leave to reargue and renew their appeal, and on such reargument and renewal grant the relief in accordance with the arguments herein. Alternatively, leave should be granted to appeal to the Court of Appeals.

Additionally, because this case involves a politically sensitive issue revolving around the legality of cross-endorsement of judicial candidates, Appellants respectfully submit that those members of the panel which rendered the Decision and Order--and any other Justices of this Court who were themselves cross-endorsed in their own election campaigns--should avoid even "the appearance of impropriety" and recuse themselves

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[5] The Answers and motion papers of the individual co-Defendants were not served in accordance with the Order to Show Cause initiating the proceeding.

from any further consideration of this sensitive issue (Point V) (Exhibit "E").

Further particulars as to the facts underlying this proceeding are set forth in the Statement of Facts found at pp. 4-9 of Petitioners' Brief on Appeal, incorporated herein by reference, as well as in the accompanying Affidavit of Doris L. Sassower, sworn to July 25, 1991.

ARGUMENT

POINT I

APPELLANTS SHOULD HAVE BEEN GIVEN NOTICE AND AN OPPORTUNITY TO SUPPLEMENT THE RECORD IF RESPONDENTS' TECHNICAL OBJECTIONS WERE TO BE CONSIDERED

This Court, while acknowledging that Justice Kahn had "specifically decided not to address any procedural issues and chose instead to dismiss the petition", completely disregarded critical facts. Indeed, before this Court could address "the legitimate procedural objections" raised by Respondent Miller's motion, it is respectfully submitted that Appellants were entitled to notice of such intention and an opportunity to supplement the Record, as, for example, by procuring the transcript of the oral argument before Justice Kahn.

This Court plainly overlooked the fact that before Respondents' procedural objections could be entertained, Appellants were entitled to a decision on the threshold question raised by their procedural objection that these Respondents had no standing to raise objections since they were in default,

inter alia, by failing to comply with time requirements of the Order to Show Cause initiating this proceeding. Since Justice Kahn had deliberately not ruled on that issue to accomodate Respondents' urgent demands for expediency, Appellants were entitled, at very least, to a remand to Justice Kahn so that he could make a determination of that issue.

It should be emphasized that Respondents are represented by eight seasoned lawyers and law firms. By failing to file any Cross-Notice of Appeal from Justice Kahn's Decision, explicitly rejecting technical objections raised by both sides as a ground for decision, or a Jurisdictional Statement expressly raising the issue as to the propriety of his doing so, or even including that issue as one of their "Questions Presented" on appeal in their Briefs, Respondents must be deemed to have waived their technical objections and to have accepted not only Justice Kahn's Decision, but the means by which he arrived at it. Appellants had a right to rely on such waiver. Parties to a litigation had a right to chart their own course, and once they do so, the Appellate Division is not free to alter it, without notice. Cf. Mihlovan v. Grozavu, supra.

Appellants' position on this point is further set forth in their Reply Brief (pp. 9-11).

For this Court to say that "[R]espondents were not aggrieved by Supreme Court's decision in their favor, [and] it

was not necessary for them to appeal"[6] overlooks the prejudice done by this Court's adoption, without notice to Appellants, of a position completely at odds with Justice Kahn's approach and ratio decidendi. By failing to give "adequate notice to the parties...which, in this case, should have been expressly given by the court...it deprived plaintiff of the opportunity to make an appropriate record", Mihlovan v. Grozavu, 72 NY2d 506.

It is respectfully submitted that if this Court viewed Justice Kahn as required to rule on Respondents' procedural objections as to, inter alia, non-joinder of necessary parties, then Respondents clearly were aggrieved by his failure to do so. Indeed, Respondents, without filing a Cross-Notice of Appeal, have clearly gained the benefit of a decision reversing Justice Kahn on that point, which plainly aggrieves Appellants.

At minimum, Appellants representing the public interest should have been given adequate notice to supplement the Record so as to establish the facts as to Respondents' default and consequent lack of standing to raise their procedural objections.

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[6] It is respectfully submitted that this Court improperly relies on Lonstein v. Seeman, 112 AD2d 566 for the position that Respondents were not "aggrieved" by Justice Kahn's Decision, and, therefore, did not have to file a Notice of Appeal of their own. In Lonstein, supra, the facts do not indicate any possible basis upon which defendants could be aggrieved "inasmuch as the deficiency judgment, which was not vacated, [was] solely against defendant Norman Seeman and does not adversely affect these defendants."

POINT II

ALL NECESSARY PARTIES HAVE BEEN JOINED OR COULD EASILY BE ADDED.

The Decision/Order of this Court held that failure to join necessary parties warranted dismissal of the Petition. Such holding rests on a misapplication of the law of joinder. Under applicable law, the drastic remedy of dismissal is contrary to the clear legislative intent of CPLR 1001.

Under CPLR 1001(a), parties are "necessary" and should be joined as parties when either "complete relief" cannot be accorded in their absence, or when they "might be inequitably affected by a judgment in the action."

Respondents in this proceeding comprise all parties necessary to its full adjudication. Respondents have not shown how the unnamed parties would be "inequitably affected" within the meaning of CPLR 1001(a). By the foregoing statutory definition, such omitted parties were not necessary parties. See, In the Matter of Patrick L. Lucariello v. Commissioner of the Chatagua County Board of Elections, 148 A.D.2d 1012, 324 N.Y.S.2d 850 (4th Dept. 1989).

Appellants did not seek any relief under the Election Law against any omitted parties and joined only those parties against whom relief was requested. Indeed, as to the 1989 judicial candidates whom the Court in its footnote 2 suggests were also "necessary", the Court apparently overlooked the fact that such persons are jurisdictionally beyond the purview of a 1990 Election Law proceeding (see, Election Law, Sec. 16-102).

Appellants neither could, nor did they, ask any relief from this Court against the nominating certificates of the 1989 judicial nominees. By that test, the candidates named therein were not "necessary" parties.

This Court further failed to recognize that the Petition set forth two separate causes of action: (1) based on illegal cross-endorsement agreements, implemented at the 1990 nominating conventions; and (2) based on the illegal and fraudulent manner in which the 1990 conventions were conducted--irrespective of any agreement. Clearly, the 1989 judicial nominees were not necessary parties for an adjudication relative to the improperly-run 1990 conventions. At very least, a motion to dismiss addressed to the Petition as a whole had to be denied for that reason alone, as a matter of law. O'Reilly v. Executone of Albany, Inc., 121 App.Div.2d 772 (3rd Dept. 1986).

Moreover, Respondents did not show how they were prejudiced by the omission of the 1989 cross-endorsed judicial nominees.

Appellants will address the relevance of the other non-joined parties--also found by this Court to be "necessary".

A. The Non-Cross Endorsed Judicial Candidates On The Nominating Certificates

Due to an unexpected judicial vacancy in 1990, each of the parties to the 1989 cross-endorsement barter agreement nominated one candidate that year who was not nominated by the other party. The Democrats nominated Joan Lefkowitz for Justice of the Supreme Court. She won a contested election against

George Roberts, the Republican nominee. By contrast, Respondents Howard Miller and Francis Nicolai were nominated and elected in uncontested races in 1990 as part of a cross-endorsements deal.

Their nominations are under direct challenge--not those of Justice Lefkowitz and Mr. Roberts. See, Matter of Farley v. Mahoney, 130 Misc.2d 455, ___, 496 N.Y.S.2d 607, 611 (Sup. Ct., Erie Co., 1985) ("...a candidate whose designation or nomination is at issue, is a necessary party.")

Nonetheless, this Court's Decision states that all judicial nominees should have been joined, including those who ran contested races. This result obtains from the conclusion that "petitioners object in terms which indicate that they are challenging the certificates in their entirety". This incorrect view is contradicted by "the WHEREFORE clause" of the Petition (R. 23-4) showing that only the nomination and election of Respondents Emanuelli, Nicolai, and Miller are under direct challenge--not those of Justice Lefkowitz and Mr. Roberts, against whom no relief is requested.

Appellants do not seek to set aside the entirety of the nominating certificates, but only such portion thereof as relates to the challenged nominations. Were the Court to grant the relief requested based on the illegality of the cross-endorsement agreement implemented at the 1990 conventions, it could declare the certificates of nomination void only as to nominees who were parties to this lawsuit and whose nominations are "at issue".

Even assuming, arguendo, that Justice Lefkowitz and Mr.

Roberts were necessary parties, like any other allegedly necessary parties mentioned by the Court, they are each subject to the Court's jurisdiction and could easily have been added. Under CPLR 1013, they could also have easily intervened at any point--without objection from Petitioners. Indeed, they each received notice of Appellants' Specifications of Objections to the nominating certificates and conventions (Exhibit "D"). Nonetheless, neither sought to intervene or to take any other action to protect their respective interests, if they needed protection.

Moreover, the Decision contradicts this Court's reasoning in its recent decision in Matter of Michaels v. New York State Board of Elections, 154 App. Div.2d 873, 546 N.Y.S.2d 736 (3d Dept. 1989). In that case, this Court, although it found the nominating procedures of the political party defective, held that it was not a necessary party to a proceeding to nullify the certificates of nomination because it was not "inequitably affected by [a] judgment" nullifying the certificates. In this case, the interests of the candidates in a contested election, like the political party in Matter of Michaels, supra, are not "inequitably affected" by a judgment nullifying the certificates of candidates whose nominations resulted from an illegal, unconstitutional, fundamentally unfair cross-bartering agreement to nominate them on an uncontested basis.

Finally, CPLR 1001(b) contemplates excusing non-joinder of necessary parties "when justice requires", and allows an

action to proceed, even where the necessary party cannot be joined. As already noted, that is not the case here. Both Justice Lefkowitz and Justice Roberts could readily be added by Court direction at this post-election juncture. Under such circumstance and considering the enormous investment of legal and judicial time already made in this public interest case, justice requires that the action be allowed to proceed.

B. The 1989 Cross-Endorsed Judicial Candidates

The 1989 cross-endorsed judicial candidates were not joined as parties to this proceeding. Nor, as "the WHEREFORE clause" of the Petition shows, was any relief asked against them. As noted hereinabove, under Section 16-102 of the Election Law, no challenge could be made against 1989 judicial candidates in an Election Law Proceeding brought in 1990. Hence, they were not "necessary" parties. Such omitted persons could have sought intervention, whether as necessary or proper parties under CPLR 1013. This case was well-publicized--and there is no claim, nor could there be, that they were unaware of the proceeding. Their failure to seek intervention shows they have no desire to become parties and the failure of any of the Respondents to implead them shows the lack of prejudice. Cf. Fink v. Salerno 105 App. Div. 2d 489, 481 NYS2d 445 (Third Dept, 1984), app. dism'd. 63 NY2d 212, 483 NYS2d 212, 472 NE2d 1040, where intervention was denied when the proposed intervenors delayed unduly in making their motion, and there was no claim they were unaware of the proceeding early enough to have made their motion promptly.

C. Other County Executive Committees And Boards of Elections

The Decision also cites as "necessary parties" the party County Committees in the Ninth Judicial District, other than Respondents Westchester Republican and Democratic County Committees, and the County Boards of Election, other than Respondent Westchester County Board.

The Westchester entities were named in the Petition because the challenged nomination of Emanuelli involves a Westchester County office. Nominations are made by the county political committee and certified with the County Board of Elections, jurisdiction over which would have been necessary to implement a direction by the Court. No other county committee was necessary to effect complete relief, since no nominations to judicial positions in any other county are involved.

Nominations for the office of Supreme Court Justice take place at a district-wide convention over which the county political committees and boards of election have no control. No other county committee or boards of election are involved in the nomination of any public official whose election is challenged by this proceeding. Thus, no other such party would be "inequitably affected" by a decision for Appellants in this proceeding. See, Matter of Berman v. Board of Elections of the County of Nassau, 68 N.Y.2d 761, 506 N.Y.S.2d 432 (1988); Matter of Buley v. Tutanjan, 153 A.D.2d 784, 544 N.Y.S.2d 399 (3d Dept. 1989) (Vacancy committee of political party not a necessary party). Nor are any such parties required to implement any relief against

any party hereto.

D. Officers At Nominating Conventions

Unnamed officers elected at the conventions are not under challenge here. Their positions were temporary and limited to the pre-election period. Once the election is over, they are officio defunctus. The pro tanto invalidation of the nominating certificates does not require any further action on their part and no relief was sought against them.

The cases cited in the Decision do not involve a post-election situation, such as the instant case. Nor do they support invalidation of this proceeding by dismissal of this Petition. In those cases the petitions raised objections only to the technical procedure by which nominations in each case were made. Matter of Greenspan v. O'Rourke, 27 N.Y.2d 846, 316 N.Y.S.2d 639 (1970); Matter of Sahler v. Callahan, 92 A.D.2d 976, 460 N.Y.S.2d 643 (3rd Dept. 1983) ("proceeding pursuant to Section 16-102 of the Election Law for late filing of list of party members]..."); Matter of McGoey v. Black, 100 A.D.2d 635, 473 N.Y.S.2d 599 (2d Dept. 1984) (petition invalidated for insufficient number of signatures).

In stark contrast, this Petition challenges an illegal and unconstitutional agreement to control the selection and conduct of judges. The nominating conventions at which the subject cross-endorsements agreement was actualized were not only themselves violative of the Election Law because of the fraudulent and illegal manner in which they were conducted--they

were used by the party leaders and their judicial nominees as vehicles whereby their illegal contract was implemented. All of the cases cited in the Court's Decision, unlike this one, address only narrow, technical objections to nominating petitions or conventions[7], rather than the fundamental, larger questions at issue--the sanctity of the franchise and the integrity of our democratic and judicial process.

The conclusion reached by the Appellate Division that necessary parties were omitted and that therefore "this proceeding is fatally defective" overlooked the fact that the Court, under CPLR 103, could, inter alia, have converted the proceeding into an action for a declaratory judgment--an appropriate vehicle for the examination of the constitutional infringement resulting from the cross-endorsements agreement in question, Boryszewski v. Brydges, 37 N.Y.2d 361, and permitting joinder of any omitted parties deemed necessary by the Court. Considering the importance of establishing the legal and ethical efficacy of the cross-endorsement judge-bartering agreement, the fact that the 1991 phase of the agreement is already being implemented preparatory to this year's general elections, and that other similar judicial cross-endorsement deals are in the making--it was, and is, incumbent upon the Court to facilitate a prompt adjudication on the merits.

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[7] Petitioner-Appellants do not intend by this argument to waive their timely objections to the nominating certificates of which all necessary parties had notice (R. 32-51).

POINT III

LEAVE TO JOIN, IMPLEAD, OR INTERVENE--NOT DISMISSAL--IS THE APPROPRIATE REMEDY FOR ANY OMITTED PARTY DEEMED NECESSARY BY THE COURT

It is Appellants' position that although the alternate avenue of relief by conversion of this proceeding into a declaratory judgment action was available, CPLR 1001 itself indicates that there was no jurisdictional non-joinder here[8]. As hereinabove noted, under CPLR 1001(a), a person is not a necessary party if "complete relief can be accorded between the persons who are parties...or who might be inequitably affected by a judgment". In the instant case, the Petition shows that complete relief could have been granted against the three judicial candidates named without inequitably affecting a person not a party, and that there were no unjoined necessary parties.

Even assuming necessary parties were not joined, necessary parties are not always indispensable parties. Indeed, the Court itself does not so characterize them in its Decision. That characterization is limited to those cases where the determination of the Court would adversely affect non-parties. Castaways Motel v. Schyler, 24 N.Y.2d 120, adhered to 25 NY 2d

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[8] Apart from the issue as to Respondents' lack of standing to make any motions by reason of their being in default, in the absence of a jurisdictional non-joinder, the motion to dismiss by one Respondent should not inure to the benefit of all other Respondents who made no motion on that ground. (cf. Smith v. Pach, 30 AD2d 707 in which the court ruled that where a motion to dismiss on lack of subject matter jurisdiction was served after the time when service of the answer was required, the motion would be denied and defendant required to raise the issue by answer.)

692. The absence of a necessary party does not mandate the drastic remedy of dismissal, if the action can proceed without such joinder, Ayers v. Coughlin 72 NY2d 346 (1988); Re Comcoach Corp. 698 2d 571 CA2 NY (1983).

It is respectfully submitted that dismissal in this case is repugnant to the public interest and should be avoided--particularly at this post-election posture of the instant proceeding.

CPLR 1001(b) specifically provides as follows:

> "When joinder excused. When a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned. If jurisdiction over him can be obtained only by his consent or appearance, the court, when justice requires, may allow the action to proceed without his being made a party." (emphasis added)

Plainly, justice requires this proceeding to continue until a final adjudication on the merits as to the legality of the cross-endorsements judge-bartering agreement and of the judicial nominating conventions. The legislative intent expressed in CPLR 1001(b) is antithetical to dismissal for non-joinder, except in the most narrow and limited situations--and then only as a last resort, without prejudice (CPLR 1003), if there is absolutely no possibility of bringing in such absent necessary parties, (e.g., when they are outside the Court's jurisdiction--not the situation here), and the action cannot proceed in their absence.

This Court apparently overlooked said applicable law in

dismissing the Petition. It is respectfully submitted that Matter of Marin v. Board of Elections of the State of New York, 67 N.Y.2d 634, 499 N.Y.S.2d 644 (1986), cited by the Court to justify dismissal, is also inapposite. There was no indication in that case that petitioners had even served the initial Objections, called for under the Election Law, on all challenged nominees, as is the case here. Indeed, the Court may have overlooked the fact that although the nominations of Joan Lefkowitz and George Roberts were not being challenged, Appellants did serve their Specifications of Objections on each of those individuals (Exhibit "D")--both of whom were running for the Supreme Court, without benefit of cross-endorsements, on the Democratic and Republican lines respectively.

Having had due and timely notice of Appellants' Objections to the certificates of nomination ensuing from the 1990 judicial nominating conventions at which they were both nominated, Justice Lefkowitz and Mr. Roberts could have intervened if they believed it necessary to protect their interests. Matter of Martin v. Ronan, 47 N.Y.2d 486, 419 N.Y.S.2d 42 (1979) (permitting intervention by necessary parties) or if Respondents deemed themselves inequitably affected by their non-joinder, they could have moved to implead them.

Under CPLR 1001(b), once the Court determines an omitted party to be necessary and he is within the jurisdiction of the court, "the court shall order him summoned", or it may allow the action to proceed without him being made a party,

i.e., the action is not automatically dismissed.

Had Justice Kahn ruled adversely to Appellants on Respondents' non-joinder objection on October 15, 1991, they would have still had time to bring in Justice Lefkowitz and Mr. Roberts, both of whom had already been served with Specifications of Objections. The Court could have granted Appellants' leave to amend their Petition by adding parties deemed necessary. See CPLR § 1003 which provides that "[P]arties may be added...by the court on motion of any party or on its own initiative, at any stage of the action and upon such terms as it may be just".

The transcendent public interest issues affected by this Petition demand that the Court exercise its discretion, at this stage, to allow Appellants leave to amend the Petition to add any parties which the Court finds necessary[9].

POINT IV

THE ATTORNEY GENERAL DEFERRED TO THE STATE BOARD OF ELECTIONS AS THE STATE BODY TO BE SERVED IN THE CASE

This Court held that "[a]nother basis for dismissal of this proceeding is Petitioners' failure to serve the Attorney-General..." (Exhibit "A", fn. 3).

It is respectfully submitted that this holding must be reconsidered in light of the fact that no motion was made by

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[9] As shown by Appellants' Record, Briefs on Appeal, and as hereinabove described, Respondents failed to preserve their technical objections for appellate review.

Respondent New York State Board of Elections to dismiss on that ground, nor was any objection based thereon included in their Answer (R. 127). Indeed, that agency had no such objection and specifically waived service in this proceeding (Exhibit "C"). This case is similar to Duffy v. Schenck, 73 Misc.2d 72, 341 N.Y.S.2d 31 (Sup. Ct. Nassau Co.), affirmed, 42 A.D.2d 774, 346 N.Y.S.2d 616 (2d Dept. 1973), in which the Attorney General evidenced his awareness of the action by participating in an appeal even though he had not previously been served; the Court held that failure to serve the Attorney General did not require dismissal.

The Attorney General was aware of this proceeding, and opted explicitly not to be involved, deferring to the State Board of Elections which has its own counsel. See Exhibit "C", as well as accompanying Affidavit of Doris L. Sassower. Here, as in Duffy, the Attorney-General made a conscious decision, in the one case to participate even though not served, in this case, not to participate directly, but instead to rely on the legal representation of the public agency's own counsel.

It would work an injustice and offend important public interests in this far-reaching case to dismiss an otherwise valid Petition on the merest of technicalities, especially where the Attorney General explicitly deferred participation to the State Board of Elections, and its counsel so advised all parties.

Assuming, arguendo, that failure to serve the Attorney General were considered jurisdictional, non-waivable, and non-

remediable, the omission can result only in dismissal of the Petition against the State Board of Elections, the only "State body or officers" named in the Petition. See, CPLR 2214(d); see, De Carlo v. De Carlo, 110 A.D.2d 806, 488 N.Y.S.2d 228 (2d Dept. 1985). However, as noted, the New York State Board of Elections made no motion to dismiss by reason of the failure to serve the Attorney-General, nor did it include such objection in its Answer, thereby itself waiving same as a ground for dismissal.

Since the Court has ruled on an issue expressly not considered by the lower court, Petitioners are entitled to renewal of their appeal of the Decision and Order. CPLR 2221; Whitbeck v. Erin's Isle, Inc., 109 A.D.2d 1032, 487 N.Y.S.2d 147 (3d Dept. 1985) (Motion to renew motion to vacate default judgment granted upon showing of cause for not including information in original submission); see, Bassett v. Bando Sangau Co., Ltd., 103 A.D.2d 728, 478 N.Y.S.2d 298 (1st Dept. 1984) (Motion for renewal granted and order dismissing answer and counterclaims reversed because "[a]ctions should, wherever possible, be resolved on the merits..."); Esa v. New York Property Insurance Underwriting Association, 89 A.D.2d 865, 866, 453 N.Y.S.2d 247, 249 (1st Dept. 1982) (where an issue is raised for the first time sua sponte, the Court should exercise its discretion by granting a motion for renewal bringing additional facts bearing on that issue to its attention).

As in the case of the non-joinder objection, it is respectfully submitted that this Court likewise improperly

deprived Appellants of notice and an opportunity to make an adequate record on this technical objection specifically rejected as a basis for decision by the Court below and not the subject of a Notice of Appeal by Respondents.

POINT V

THE JUSTICES ON THIS PANEL WHO WERE CROSS-ENDORSED SHOULD RECUSE THEMSELVES

Three of the Justices on the panel which heard the appeal in this case were themselves products of cross-endorsement arrangements. They are, thus, not disinterested in the outcome of this litigation--which may explain why this Court decided not to address the serious issues concerning cross-endorsement agreements, either in general or as to the specific agreement involved in this case, or the fact that Justice Kahn's dismissal was based on a wholly erroneous view of the facts and applicable law.

The cross-endorsements of these, as well other Appellate Division judges, may also explain why this case was denied the automatic preference given Election Law cases and not calendared for oral argument before the Appellate Division on the last day of the term, October 19, 1991--even though all specified preconditions were met by Appellants in order for it to be argued on that date. Indeed, it may further explain why even after Appellant's made formal written application[10] for the preference, to which they were entitled to as a matter of right,

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10 See Exhibits "E", "F", and "G" to Doris L. Sassower's Affidavit.

that was also denied, with no mention of the support for Appellants' asserted preference, given by the State League of Women Voters, which issued a state-wide alert urging that this case be heard and decided before Election Day. A copy of their press release to that effect was appended as Exhibit "A" to Appellants' Reply Affirmation, dated October 28, 1990.

The failure of judges of this Court's bench to disqualify themselves from deciding an appeal in which their impartiality "might reasonably be open to question" or even to disclose their own cross-endorsements necessarily erodes public confidence in the integrity of the judiciary, particularly when the Decision results in dismissal of the Petition.

In view of the fact that the Petition is based on the unconstitutionality, illegality and impropriety of cross-endorsement of judicial candidates by the two major parties (see, Petition, passim; R. pp. 13-25), Appellants respectfully submit that it is unwise, unfair and unethical for any Justice of this Court who has himself or herself been cross-endorsed to participate in this proceeding.

Appellants' position follows from fundamental principles of judicial ethics embodied in the Rules of the Chief Administrator of the New York Courts, and the Code of Judicial Conduct. These key precepts mandate that a judge must

* "observe high standards of conduct so that the integrity and independence of the judiciary may be preserved." (Canon 1, Rules § 100.1);

* "respect and comply with the law and... conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary; and"

* "disqualify himself or herself in a proceeding in which his or her impartiality might reasonably be questioned." (Canon 3(c)(1), § 100.3(c)(1)).

As the Supreme Court of the United States has affirmed

> "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 150, 89 S. Ct. 337, 340 (1968).

Thus, however confident a judge may be of his or her own impartiality, and even though he or she may in fact actually be impartial, he or she is bound to consider the appearance to the litigants and the public of participating in a proceeding. In Matter of Fuchsberg, 426 N.Y.S.2d 639 (Court on the Judiciary 1978), the Court, relying on this "objective factor of the appearance of impartiality" held that respondent had violated Canon 3(c)(1) by not withdrawing from a case in which he had a possible financial interest. The Court went on to say:

> "We reach this conclusion without questioning respondent's belief in his own impartiality, or, indeed, the fact of his impartiality in contributing to the decision of this case. Our concern, rather, is with "[t]he guiding consideration...that the administration of justice should reasonably appear to be disinterested as well as be so in fact." [Citations omitted.] 426 N.Y.S.2d at 645.

See, 28 N.Y. Jur. "Judges," § 179 (1983) ("[I]t is of transcendent importance to litigants and the public generally that

there should not be the slightest suspicion as to [a judge's] fairness and integrity.")

This same "guiding consideration" applies in this case. Justices of the Supreme Court who owe their offices to cross-endorsement by political parties might reasonably be concerned with how a decision favorable to Appellants would impact on their own positions, particularly if it were to be viewed as having retroactive effect. Indeed, as shown by the accompanying Affidavit of Doris L. Sassower, the question as to retroactive application was expressly raised by the Court on oral argument, when she was asked specifically by the Presiding Justice to comment on the propriety of the cross-endorsement of certain other judges many years ago. The Presiding Justice, however, did not reveal his own more recent triple cross-endorsement.

Certainly, self-interested concern for position, salary and status would objectively appear to compromise the impartiality of a Justice considering the Petition in this proceeding, whatever the true facts are. Thus Canons 1 and 3(c) and §§ 100.1 and 100.3(c) counsel that any Justice of the Appellate Division, Third Department, cross-endorsed by the Democratic and Republican parties disqualify himself or herself from any further considerations in this proceeding.

POINT VI

ALTERNATIVELY, LEAVE TO APPEAL TO THE COURT OF APPEALS SHOULD BE GRANTED

The legal issues to be presented to the Court of Appeals are, inter alia, as follows:

1. Whether the cross-endorsements bartering contract in issue is an invidious violation of the New York State Constitution, the Election Law of the State of New York, the Code of Judicial Conduct and court rules relative thereto, including the Rules of the Chief Administrator of the Courts and as such, illegal, void, and against public policy.

2. Whether the Decision of the Appellate Division deprived Appellants of the right to be heard by an impartial bench in violation of their rights under the New York State and United States Constitutions, and whether judges of this Court, themselves cross-endorsed, should have recused themselves.

3. Whether the Appellate Division's dismissal of the Petition against all Respondents on the ground of Appellants' non-joinder of necessary parties is proper where (a) Respondents were in default by filing untimely and unverified papers, and, therefore, without standing to raise objections; (b) the lower court expressly refused to address the technical objections, raised by both sides, including specifically Appellants' objection that Respondents were in default and the individual Respondents' objection as to non-joinder of necessary parties; and (c) Respondents took no separate appeal or cross-appeal from the lower court's ruling on that or any other technical defenses

or objections, and whether, therefore, the objection of non-joinder of necessary parties was not preserved for appellate review; and (d) only one Respondent made a motion to dismiss on the ground of non-joinder of necessary parties.

4. Whether all parties necessary for the relief sought by Appellants were joined.

5. Whether the failure of the Respondent New York State Board of Elections to make any motion to dismiss based on the failure to serve the Attorney-General or raise any objection based thereon, as well as the Attorney General's express waiver of service upon his office, dispensed with the requirement for service upon him, and precludes a dismissal on that ground.

6. Whether in light of the transcendent public interest issues involved and the lack of prejudice to Respondents at this post-election stage of the proceedings, any omission of necessary parties can be cured by direction of the Court under CPLR 1001(b).

7. Whether under all the relevant circumstances, dismissal a drastic and inappropriate remedy as a matter of law and in the interests of justice.

Although it is Appellants' position that appeal to the Court of Appeals lies as of right pursuant to CPLR Sec. 5601(b), it is respectfully requested that in the event the Appellants are not entitled to appeal as of right, that the Appellate Division grant permission for leave to appeal to the Court of Appeals.

CONCLUSION

For all the reasons set forth hereinabove and in the accompanying supporting papers, it is respectfully prayed that the relief prayed for should be granted in all respects.

Dated: Yonkers, New York
July 25, 1991

Respectfully submitted,

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