BEFORE THE DULY CONSTITUTED ELECTORAL BOARD FOR THE HEARING AND PASSING UPON OF OBJECTIONS TO THE PETITION PAPERS FOR CANDIDATES OF NEW POLITICAL PARTIES IN THE STATE OF ILLINOIS

Lou Atsaves and Gary Gale;	**)**	
Petitioner-Objectors,	**)**	
	)	
vs.	**)**	
	)	
The Libertarian Party as a	**)**	
purported new political party in	**)**	
the State of Illinois, et al.	**)**	**14 SOEB GE 515**
	)	
Respondent-Candidates.	**)**	

OBJECTORS' EXCEPTIONS TO THE HEARING OFFICER'S RECOMMENDATION

Now come Lou Atsaves and Gary Gale (hereinafter referred to as the "Objectors"), and for take exception to the Recommendation of the Hearing Officer in this matter. For their Exceptions, the Objectors state as follows:

1. On Friday, August 8, 2014, the Hearing Officer in this matter issued her Recommendation with respect to the Objector's Petition. Following a three-day hearing and post-trial briefing, the Hearing Officer ultimately found that the Libertarian Party Candidates have submitted 25,989 valid signatures in their effort to earn a place on the General Election ballot.

2. The Recommendation presents analysis of a variety of circulator issues, some of which were called in favor of the Objectors, some of which were called in favor of the Candidates. The Objectors take specific issue with the handling of the evidence elicited regarding the validity of the signatures purportedly gathered by one circulator in particular: Sarah Dart. Respectfully, the Hearing Officer's Recommendation with regard to Ms. Dart is against the manifest weight of the evidence and should not be adopted by the Board. In addition to improperly weighing the evidence presented by each side, the Objectors also specifically take

exception to the following errors: (1) the Hearing Officer applied an incorrect standard of proof for the allegations against Ms. Dart; (2) the Hearing Officer striking *sua sponte* 23 affidavits offered by the Objectors in sur-rebuttal of Ms. Dart's testimony; (3) the Hearing Officer introducing and relying on unauthenticated historical weather data that was offered by neither party.

3. The Objectors alleged that Ms. Dart engaged in a pattern of fraud, primarily in that she was not the true circulator of the petition sheets she purported to have circulated. The quantum of evidence presented by the objectors demonstrating that Ms. Dart did not act alone was considerable. In total, Ms. Dart purports to have circulated 194 petition sheets containing 3,930 signatures – a truly robust effort. However, what is more incredible is that Ms. Dart purports to have collected 96% of these signatures in just a 6-week span, between March 31st (the date Ms. Dart specified that she began to collect petition signatures) and May 14th. During this time period, Ms. Dart had notarized 187 petition sheets containing over 3,790 petition signatures.[1] To collect 3,790 signatures in 6 weeks would require a person to collect at least 631 signatures per week, or 90 signatures per day, every single day (including weekends and holidays), for 6 full weeks – truly a tall order. Ms. Dart's petitions were notarized on the following dates, in the following numbers:

April 7th:	23 petition sheets
April 9th:	14 petition sheets
April 14th:	14 petition sheets
April 15th:	3 petition sheets
April 16th:	2 petition sheets
April 21st:	13 petition sheets
April 23rd:	11 petition sheets
April 28th:	33 petition sheets
April 30th:	6 petition sheets
May 7th:	37 petition sheets

[1] All but 7 of Ms. Dart's sheets were notarized by May 14, 2014. Each of the Libertarian Party petition sheets contains space for 20 signatures.

May 14th: 31 petition sheets
June 16th: 7 petition sheets

4. By way of comparison, Darryl Bonner -- a professional, paid circulator who lives in California – and who flew into Illinois specifically to collect petition signatures for the Libertarian Party Candidates, submitted 199 petition sheets containing 3,667 signatures between late March and May 15th.[2] At first blush, Mr. Bonner's number look similar to Ms. Dart's.

5. However, Mr. Bonner was not circulating alone. As was well documented in the record and in the Recommendation, Mr. Bonner had the help of another individual during this time period who circulated petition sheets in Central Illinois while Mr. Bonner circulated in the Chicago area, and which Mr. Bonner claimed as his own. Mr. Bonner's petition sheets were rightfully invalidated. However, the fact that Mr. Bonner's rate of collection during these 6 weeks *with the assistance of another individual* is actually less than Ms. Dart's is instructive, and compelling.

6. To substantiate their pattern of fraud claim, the Objectors presented 96 affidavits[3] of individuals who acknowledged signing a petition that Ms. Dart had purportedly circulated, but who averred that Ms. Dart was not present when they signed that petition sheet. Each of these affiants were shown a photograph of Ms. Dart that was taken in late July, and each affiant affirmed that the woman in the photograph (Ms. Dart) was not present when they signed the petition sheet. Notably, in the photograph taken of Ms. Dart in late July, Ms. Dart is wearing her hair in an afro.

7. Many of these affiants signed common pages that were purportedly circulated by Sarah Dart, providing even support for the charge that Ms. Dart had others circulate for her. For

[2] Mr. Bonner actually got a healthy head start on Ms. Dart, having already notarized 19 petition sheets by March 31st, which was the day Ms. Dart began collecting.
[3] The Objectors presented 73 affidavits in their case-in-chief and 23 in sur-rebuttal of the Candidates' rebuttal case.

example, the Objectors presented 5 affidavits of signers of petition page no. 1232: Theresa Craft (page 1232, line 2); Jacqueline James (page 1232, line 7); Haibee Romman (page 1232, line 10); Shanikia Selvy (page 1232, line 14); and Maricela Arechiga (page 1232, line 20). Surely, had Ms. Dart actually circulated this page, there would not be five affiants claiming she had not. In fact, well over half of the affidavits presented by the Objectors were for signers of sheets against which multiple affidavits were presented. The Objectors presented multiple affidavits on 23 different petition sheets. Those petition sheets, the number of affidavits gathered on each, and the date the sheet was notarized is as follows:

1. Sheet 388: 3 affidavits signers (Notarized May 14th)
2. Sheet 490: 2 affidavit signers (Notarized May 14th)
3. Sheet 518: 3 affidavit signers (Notarized May 14th)
4. Sheet 527: 3 affidavit signers (Notarized May 14th)
5. Sheet 637: 2 affidavit signers (Notarized May 14th)
6. Sheet 1232: 5 affidavit signers (Notarized April 15th)
7. Sheet 1249: 2 affiants, 4 affidavits (Notarized April 14th)
8. Sheet 1268: 2 affidavit signers (Notarized May 7th)
9. Sheet 1471: 2 affidavit signers (Notarized April 14th)
10. Sheet 1492: 6 affidavit signers (although evidence was presented contesting 2 of these) (Notarized April 21st)
11. Sheet 1565: 2 affidavit signers (Notarized April 14th)
12. Sheet 1575: 6 affidavit signers (Notarized April 14th)
13. Sheet 1583: 3 affidavit signers (Notarized April 14th)
14. Sheet 1592: 2 affidavit signers (Notarized April 14th)
15. Sheet 1680: 2 affidavit signers (Notarized April 14th)
16. Sheet 1788: 4 affidavit signers (Notarized April 28th)
17. Sheet 1815: 4 affidavit signers (Notarized April 7th)
18. Sheet 1816: 2 affidavit signers (Notarized April 28th)
19. Sheet 1837: 2 affidavit signers (Notarized April 7th)
20. Sheet 1898: 2 affidavit signers (Notarized April 9th)
21. Sheet 1900: 2 affidavit signers (Notarized April 7th)
22. Sheet 1912: 2 affidavit signers (Notarized April 7th)
23. Sheet 1914: 2 affidavit signers (Notarized April 7th)

This pattern provides a compelling case that Ms. Dart was not the true circulator of at least these 23 petition sheets. These affiants fairly span the entirety of the period in which Ms. Dart purports to have collected signatures. And, while not the mountain of evidence compiled

against Darryl Bonner (198 affidavits attesting that he was not the circulator) the fact that the Objectors produced 96 affidavits, with so many that are multiple to a petition page is nonetheless a compelling amount of evidence.

8. To rebut the Objectors' evidence, the Candidates offered Ms. Dart herself. She testified in the case on August 4th, and arrived at the hearing wearing a wig. Ms. Dart claimed that she would wear a wig when the weather was cool or if it was windy[4], and she was adamant that she wore a wig, and not an afro, when she collected petition signatures for the Libertarian Candidates in April and May. (Tr. p. 156, 1-4.) Ms. Dart claimed that she – and she alone – was the true circulator of all of the sheets attributed to her. The Candidates claimed that the difference between Ms. Dart's appearance when she wears an afro and when she wears a wig accounted for the scores of affiants who claimed that she was not the true circulator of the Libertarian petition.

9. However, not only was Ms. Dart's claim that she wore a wig while collecting petition signatures was totally self-serving, and completely uncorroborated, it was also contradicted by the live testimony of another of the Candidates' witnesses. No witness, other than Ms. Dart, was offered to confirm her statement that she always wore an afro while collecting petition signatures (which was clearly in Ms. Dart's self-interest to make). Indeed, just as Ms. Dart had a monetary incentive to collect many signatures (as recognized by the Hearing Officer), Ms. Dart has an incentive to testify in a manner that would demonstrate that her signatures were valid. The self-serving nature of Ms. Dart's claim, and the fact that it was totally uncorroborated should have been taken into account, and was not done so by the Hearing Officer.

[4] Notably, it was neither cool nor windy on August 4th.

10. In fact, the only live witness who could testify with first-hand knowledge of Ms. Dart's appearance while she was collecting petition signatures was a woman named Crystal Green – and she testified unequivocally that Ms. Dart ***approached her in April wearing an afro, and not a wig.*** Ms. Green described Ms. Dart as an African-American woman, with a "very natural look" that included wearing her hair in an afro, which Ms. Green confirmed in the record a couple of times. (Tr. p. 181, lines 14-20; p. 188, lines 4-16.) Ms. Green signed the Libertarian petition roughly around Easter. (Tr. p. 181, lines 23-24.)

11. Ms. Dart's claim that the picture on the affidavits used by the Objectors was not a true likeness was further debunked by the testimony of Carlos Rodriguez, Caitlin Huxley and Morgan Kreitner. All three testified in sur-rebuttal of the Candidate's rebuttal case. All three assisted in collecting affidavits of Ms. Dart's petition signers, and all three testified that during that process they encountered signers who recognized and identified Ms. Dart (with an afro) as the individual who ***was*** present when they signed the Libertarian Party petition.[5] (Tr. p. 400, lines 17-24; p. 474, lines 1-16). These admissions against interest serve as evidence that Ms. Dart did indeed circulate some petition sheets, but that she did so while wearing an afro – which was recognized by signers. At the end of the day, Ms. Dart's self-serving claim that she wore a wig was corroborated by no one, and contradicted by all of the other evidence in the case.

12. As a witness, Ms. Dart was not credible. For example, there was a minor issue in this case regarding Ms. Dart's true address, as she could not be found at the address she listed on her circulator's affidavits. At the evidentiary hearing, Ms. Dart claimed that the address she listed on her circulator's affidavits was her true address, but that she had been staying at her friend's house on the south side of Chicago (rather than her west side home) for approximately

[5] Morgan Kreitner's precise testimony was that if any of the signers she spoke with were uncomfortable signing an affidavit regarding Ms. Dart's presence, she did not ask them to sign. (Tr. p. 455, lines 14-18.)

the last three weeks before the hearing. According to Ms. Dart, this was so she could be closer to a new restaurant with which she was involved. She testified that this restaurant had opened only two weeks earlier. (Tr. pp. 125-126.)

13. On cross examination, when asked directly if she had been staying at her friend's house on the south side longer than three weeks, she answered flatly, "No." (Tr. p. 151, lines 2-10.) However, after Ms. Dart was confronted with a copy of a letter she had written from that south side address ***two years earlier*** in which she describes herself as the "neighbor" of the recipient (whose property is immediately adjacent to Ms. Dart's friend's south side address), Ms. Dart changed her story, admitting to staying at that address "off and on" for "probably about three years or more." (See Objectors' Exhibit 23.) (Tr. p. 151, line 20 – p. 152, line 20; p. 153, lines 2-5.)

14. Ms. Dart's credibility is further called in to question by such claims that she typically collects "25 to 30" signatures in an hour – an incredible rate that does not comport with typical human experience – but could certainly help explain her prodigious rate of petition gathering. (Tr. p. 154, lines 1-5.)

15. Ms. Dart made the outlandish claim that a private investigator threatened her with "bodily and economic harm" – an incredible claim that she was unable to establish except by her own self-serving testimony. That investigator, Carlos Rodriguez, quite credibly rebutted Ms. Dart's claims with his own testimony. Indeed, Ms. Dart actually admitted that she was not truthful with Mr. Rodriguez about her own identity (she initially denied she was Sarah Dart until confronted with the fact that her neighbors had positively identified her). (Tr. p. 150.) Further, in order to embellish her testimony, at hearing, Ms. Dart describes her first meeting with Mr. Rodriguez as occurring while it was dark, when in fact that meeting occurred at approximately

6:45 P.M., while still light out, as is also evident from Ms. Dart's picture. (Tr. p. 143.) In sum, Ms. Dart struggled with the truth.

16. The Hearing Officer erred in weighing the evidence adduced regarding Sarah Dart. The Recommendation is contrary to the manifest weight of the evidence. On the one hand, the Objectors presented a rate of petition collection that defied the typical human experience and rivaled the rate of a seasoned professional who collected with another person. The Objectors presented 96 affidavits of petition signers who say Ms. Dart was not present. On the other hand, the Candidates rely on Ms. Dart's self-serving testimony that she always wore a wig while collecting signatures. The Candidates' own witness, Crystal Green, contradicted that testimony, as did the testimony of Carlos Rodriguez, Caitlin Huxley and Morgan Kreitner. The Candidates presented evidence attacking two of the Candidate's affidavits, but the Objectors rebutted that evidence on sur-rebuttal. On the whole, the manifest weight of the evidence on Ms. Dart favors the Objectors, and not the Candidates.

17. Indeed, it appears that the Hearing Officer applied an incorrect standard to the evidence in Ms. Dart's case. On page 11 of the Recommendation, the Hearing Officer concludes that "[t]here was no evidence produced ***that demonstrated that it was impossible*** for Ms. Dart to collect the number of signatures that she collected." (emphasis added) Respectfully, an Objector is not required to prove that a circulator's activities are physically impossible. Rather, pursuant to the Board's Rules and well-settled caselaw, an Objector must demonstrate ***by a fair preponderance of the evidence*** that a circulator acted fraudulently in demonstrating a pattern of fraud with regard to a circulator's petition. See *In re: Bower*, 41 Ill.2d 277 (1968), See also Rule 11 of the Adopted Rules of Procedure. The Hearing Officer's imposition of a dramatically higher standard (proof of impossibility) with respect to the case against Ms. Dart was clear error,

and dispositive in this case. Had the appropriate "fair preponderance" standard been utilized, the Recommendation would have to have been that Ms. Dart's petition sheets would be invalidated.

18. The Hearing Officer also erred in striking *sua sponte* 23 affidavits submitted by the Objectors in their sur-rebuttal of the Candidate's rebuttal case. Each of these 23 additional affiants claimed that Sarah Dart was not present when they signed the Libertarian petition. The Hearing Officer let these affidavits into evidence initially, but in her Recommendation at page 10 purports to strike them from the record. This is an error. The Hearing Officer's rationale was that these affidavits were the same as those included in the Objectors' case-in-chief, and therefore should have been disclosed with the Objectors' pre-trial disclosures. However, these affidavits were collected specifically to offer rebuttal evidence of the Candidates' rebuttal case, and indeed constitute evidence just as does the live testimony offered by the Objectors on sur-rebuttal. The Hearing Officer erred in purporting to strike these additional affidavits from the record.

19. Finally, the Hearing Officer erred by introducing and relying on unauthenticated historical weather data that was offered as evidence by neither party to support and supplement the testimony of Sarah Dart. On page 11 of the Recommendation, the Hearing Officer introduces data obtained from wunderground.com as to what the temperatures were in Chicago in April and May. To the extent that the Hearing Officer relied on this data to determine whether Ms. Dart's claims regarding her hairdo were credible, the Objectors contend that this is clear error.

20. For these reasons, the Objectors take issue with the Recommendation of the Hearing Officer with respect to the handling of the evidence pertaining to Sarah Dart, and urge the Board to not adopt this portion of the Recommendation.

Respectfully submitted,

/s/ ***John Fogarty, Jr.*** /s/
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BEFORE THE DULY CONSTITUTED ELECTORAL BOARD
FOR THE HEARING AND PASSING UPON OF NOMINATION OBJECTIONS TO NOMINATION PAPERS OF CANDIDATES FOR ELECTION TO OFFICE IN THE STATE OF ILLINOIS

KAREN YARBROUGH, Petitioner/Objector, v. SCOTT SUMMERS, BOBBY L. PRITCHETT, OMAR LOPEZ, SHELDON SCHAFER, DAVID BLACK, JULIE SAMUELS, and TIM CURTIN, Respondents/Candidates.	)	No. 2014-SOEB GE 516

CANDIDATE'S EXCEPTIONS
TO HEARING EXAMINER'S RECOMMENDATIONS

Now come the Green Party Candidates for Statewide Office, Scott Summers for Governor, Bobby L. Pritchett for Attorney General, Omar Lopez for United States Senate, Sheldon Schafer for Secretary of State, David Black for Attorney General, Julie Samuels for Treasurer, and Tim Curtin for Comptroller (hereinafter "Candidates"), and file their exceptions to the hearing examiner's recommendations.

A. SOEB violation of its own Rules equates to *prima facie* due process violation.

The SOEB Rules and Procedures are written primarily to address objections to established party candidates, for expediency in administering election objection to petition sheets with far few signatures required (e.g. 500 – 1,500 or at most, 5,000 minimum required). The SOEB Rules do not differentiate between established party petitions and new party petitions, yet, new political parties are required to submit far in excess of 25,000 signatures (realistically, well in excess of 45,000 signatures).

The hearing examiner undertook his own research, and argued in his recommendation in opposition to the Candidates, that minimal due process was afforded to Candidates, through the SOEB's notice and right to be heard. Such legal research was not advanced by Mrs. Karen Yarbrough.

Compounding the prejudicial impact of the SOEB's "one size fits all" Rules is the SOEB's refusal to adhere to its own rules (despite repeated requests from Candidates), which under Illinois precedent, can be deemed to be *prima facie* evidence of a due process violation.

A public official must comply with statutes, ordinances and administrative rules that are in place. Whether it is the administrative code governing random audits of campaign committees in February of each year, or the SOEB's Rules, public officials may not deprive public citizens of rights conferred by statutes or the Constitution. According to the hearing examiner, the SOEB's Rules (which define and govern all SOEB proceedings) are intended to protect Candidates' statutory and Constitutional rights. Such is not the case, however, as Candidates have pointed out throughout the course of the SOEB proceeding.

The Illinois Supreme Court analyzed public officer's "discretion" by reviewing a long line of cases that held that the violation of a statute or ordinance designed to protect human life or property, is *prima facie* evidence of negligence, which has been codified in the Illinois Pattern Jury Instructions, Civil No. 60 (1995). The Supreme Court then expanded the application of the negligence theory,

> Where a defendant violates one of these statutes or ordinances, a plaintiff who belongs to the class intended to be protected by that statute or ordinance and whose injury is of the type the statute or ordinance was intended to protect against may recover upon establishing that the defendant's violation proximately caused plaintiff's injury. *Kalata*, 144 Ill.2d at 434-35, 581 N.E.2d 656; *Gouge*, 144 Ill.2d at 543, 582 N.E.2d 108; *French,* 65 Ill.2d at 79, 357 N.E.2d 438.

Noyola v. Bd. of Educ. of City of Chicago, 179 Ill.2d 121, 688 NE 2d 81, 85 (1997).

The Supreme Court in *Noyola* then went on to hold that a public official must comply with statutes, ordinance, and administrative rules that are in place, and the failure to do so gives rise to a cause of action for mandamus, explained as follows:

> [Courts] most certainly have the authority to assure that the action of public officials does not deprive citizens of rights conferred by statute or the Constitution (*Dixon Ass'n for Retarded Citizens v. Thompson*, 91 Ill.2d 518, 533, 440 N.E.2d 117 (1982)). Where, as alleged here, public officials have failed or refused to comply with requirements imposed by statute, the courts may compel them to do so by means of a writ of mandamus, provided that the requirements for that writ have been satisfied. See *People ex rel Sklodowski v. State of Illinois,* 284 Ill.App.3d 809, 817-18, 674 N.E.2d 81 (1996), appeal allowed, 171 Ill.2d 584, 677 N.E.2d 971 (1997) (action for mandamus to compel state officials to comply with statutory requirements regarding funding of state retirement systems); *Senn Park Nursing Center v. Miller*, 104 Ill.2d 169, 182-83, 470 N.E.2d 1029 (1984) (mandamus proper to compel Director of Public Aid to issue reimbursements under valid existing procedure rather than invalid new procedure established by Department); *Dennis E. v. O'Malley*, 256 Ill.App.3d 334, 346, 628 N.E.2d 362 (1993) (mandamus can be used to compel clerk of the court to comply with her statutory duties);

> *Carroll v. Miller,* 116 Ill.App.3d 311, 451 N.E.2d 1034 (1983) (mandamus appropriate to compel Illinois Department of Public Aid to make assistance payments where recipients have right to such payments and Department has nondiscretionary duty to provide the payments). *[Underlining added.]*

Noyola v. Bd. of Educ. of City of Chicago, 179 Ill.2d 121, 688 NE 2d 81, 86 (1997).

As the hearing officer pointed out, the SOEB procedures (which trace their origins to the SOEB Rules) are supposed to provide a minimal level of due process, in order to protect Candidates' First Amendment ballot access and associational rights (two distinct Constitutional rights). As such, even assuming the hearing examiner's arguments in opposition to Candidates' assertions, then the Candidates are entitled to ***no less than*** what the SOEB's own Rules provide.

Under the SOEB Rules, Candidates are entitled to receive a computer generated printout showing line-by-line rulings (after being proofread for accuracy). Specifically, SOEB Rule 9 (at page 6) provides that:

> Following the records examination, copies of the sheets containing the staff rulings shall be proofread for accuracy by Board staff and the rulings thereon shall be used to create a line by line computer generated printout of the results of the records examination. The said printout shall be sent via email or facsimile to the parties or their counsel. The printout shall be sent at the same date and time and the time and such date and time shall serve as the commencement of the three (3) business day time period (aka the Rule 9 Motion Period) described below. Copies (via electronic medium or hard copy) of the recapitulation sheets containing staff ruling will not be made available to the respective parties until noon on the next business day **at the earliest**. *(Emphasis in original.)*

Despite repeated requests from Candidates' counsel, the SOEB has failed and refused to do the work that the SOEB itself agreed to do. The SOEB has not proofread the "rulings" for accuracy, and did not "**create a line by line computer generated printout of the results of the records examination**." The SOEB wrote its own rules, and presumably, knew the contents of those Rules.

At a minimum, Candidates would have, and should have been provided a line-by-line, computer generated list of SOEB rulings on Mrs. Karen Yarbrough's objections.

Rather than adhere to the scant (or superficial) level of due process which the SOEB Rules afford to new political parties, the SOEB's general counsel instead suggested that Candidates undertake a manual comparison of over 3,100 sheets of signature petitions to over 3,100 sheets of "recap sheets" that were

provided for the first time on or about August 5, 2014 (via email), to recreate a list of objections and rulings.

However, the general counsel's suggestion improperly, and in derogation of the SOEB's own Rules, further skews the playing field in favor of the Objector, Mrs. Karen Yarbrough, who already benefits from significant advantages under the SOEB's Rules. Even if Candidates did as the general counsel suggested, they would not have what the SOEB could provide, since only the SOEB could provide a proofread for accuracy, computer generated, line by line printout of rulings.

Candidates are not asking too much, either. For example, the City of Chicago and Cook County Clerk David Orr both provide line-by-line, computer generated printout of rulings on objections, in each and every single objection over which they preside. It is not only feasible, but easy to accomplish for these smaller election authorities.

Perhaps the SOEB did not anticipate the added burden of manually reviewing cryptic notations, upon over 3,100 sheets of paper for signature petitions containing over 29,000 signatures. If the SOEB, with the financial resources of the State of Illinois backing it up, is unable to create and provide to Candidates a proof-read for accuracy, line-by-line computer generated printout of the results, how can Candidates' be expected to (a) double check for accuracy, (b) create such a line-by-line computer generated printout, or (c) rehabilitate any signatures?

Due to the SOEB's failure to provide a proofread, computer generated line-by-line printout of its rulings, coupled with the unrealistic three (3) day time period for new parties to rehabilitate signatures, Candidates were unable to (a) generate their own line-by-line list of rulings (b) separate out the rulings by election authorities, (c) issue and serve subpoenas upon each election authority, and (d) obtain either notarized affidavits or certified documents from election authorities to rehabilitate signatures.

It is ludicrous for the SOEB or its hearing examiner to believe that this process, as implemented by the SOEB in the instant matter, afforded the requisite minimal level of due process to Candidates, particularly when core, or fundamental, First Amendment ballot access and associational rights are at stake.

B. SOEB/ISBE process is far removed from the process in used *Greene v. City of Chicago*.

The hearing examiner compared the SOEB's "records examination" to that of the City of Chicago, circa 1983, when up to 3,000 voter registration records were being added/deleted on a daily basis. Such a comparison is factually and legally distinguishable, in that the *Greene* electoral board reviewed original voter registration records and voter histories.

However, not only is the passage of time a distinguishing factor, but so too are the advent of computers and the greatly increased number of signatures that Candidates were expected to exceed under the established parties' Election Code.

The electoral board in *Greene* reviewed ***original*** voter registration documents (ie the "best" and authentic evidence), and reviewed voter histories as well as recent voter registration records ("kick-ins") which the City of Chicago Board of Election Commissioners maintained in its own custody and control. These documents were original, paper documents, not computer-generated data. The SOEB is not even close in comparison, since the SOEB and ISBE do not register voters, or possess any original voter registration documents, or voter histories.

The process used in the *Greene v. Chicago Board of Election Commissioners* decision, is dramatically different from an evidentiary point of view, which distinguishes the SOEB proceeding. The SOEB does not review the best evidence, but rather, uses a database comprised of hearsay within hearsay (ie the ISBE voter database is an electronic database consisting of electronic records created by other election authorities, and not original documents, and electronically transmitted on a regular basis). The ISBE voter registration database is a constantly changing database, with no quality controls, or checks, to verify the accuracy of its data.

Significantly missing, is the "paper trail" (or computer logs) that would, or could track changes to the voter database, and reveal errors, or manipulation of the database. Unlike paper records, which easily reveal and track changes made to the paper documents (whether through cross-outs, or over-rights, or "liquid paper" or stickers), an electronic database, with no logs, has no record of changes. The SOEB/ISBE database can be easily manipulated, changed and modified on a daily basis, with no records

to identify either who made the changes, or what changes were made. Such a database lacks fundamental safeguards of authenticity, that are commonplace in the business world, and is easily subject to manipulation or abuse. The SOEB/ISBE database has none of the credibility, or assurances of reliability, that were relied upon by the court in *Greene*.

C. <u>No Evidence Admitted at SOEB Proceeding – Mrs. Yarbrough failed in her burden of proof.</u>

The SOEB and its hearing officer were not "neutral decision makers" as expected. The underlying presumption of due process is that adverse parties, given the opportunity, present evidence upon which the hearing officer rules and makes recommendations. Such was not the case in the instant matter.

The hearing officer undertook an active role of a participant, by: (a) obtaining and relying upon evidence that was not in the record before the SOEB, and (b) undertaking research that was not submitted by the either party, to oppose Candidates. Ordinarily, the ISBE does not undertake an "apparent conformity" check, and certifies all candidates who timely file nomination papers. The ISBE instead relies upon an "objector-based" system to vet candidates' nomination papers – this scheme is truly an objector-biased system, which imposes few, if any, evidentiary requirements upon an objector, while turning the SOEB/ISBE into a participant. If no objection was filed, the Candidates would have been certified to the ballot. The hearing examiner exceeded his authority in this matter.

Despite precedent cited by Candidates, which asserts that although rules of evidence may be relaxed (as to authenticity or foundation, typically), the rule against hearsay is non-negotiable: hearsay is inadmissible. See also Candidates' Rule 9 motions, which discuss hearsay and Illinois Rules of Evidence.

Nobody to this proceeding – neither Mrs. Yarbrough, or the hearing examiner – have cited to persuasive authority to contradict Candidates argument that hearsay is not admissible, even in administrative hearings. No court decisions allow such a wild flaunting and utter disregard of Illinois Rules of Evidence. Even the SOEB's own Rules set out requirements that affidavits be notarized, and that documents from election authorities be certified. It flies in the face of logic to impose upon Candidates' evidentiary hurdles, that the hearing examiner has otherwise thrown out the window in his

recommendation which essentially says, anything goes.

For example, the SOEB Rules require Candidates to present evidence through affidavits, without witnesses being present to testify, or otherwise through live testimony. However, documents without an affidavit, or certification by an election authority, would not be admissible at the SOEB "evidentiary hearing" under the SOEB's own rules. And yet, the hearing examiner somewhere, somehow, not only admitted, but relied upon evidence that was not presented with Candidates' counsel was present, but via email, without even the bother of calling a witness to establish foundation and authenticate such documentary evidence. Going even further, the hearing examiner argues that rank hearsay is fully admissible, no problems whatsoever. This is not the law in Illinois, even under the SOEB's fast and loose Rules.

Evidence that was referenced/relied upon in the hearing officer's recommendation includes the dates of the "records examination" which are not identified or contained on any documents provided to Candidates counsel. Nowhere in the record is there any verified, authenticated, or affirmed statements about the "records examination" or when it was conducted, or by whom it was conducted.

Despite noting in his recommendation that no evidence was admitted at the "evidentiary hearing" (and no witnesses testified) the hearing examiner then went on to recommend that Candidates be removed from the ballot for failure to submit a requisite number of signatures. Hearing examiner's recommendation at page 2 summarized the dates of the "records examination" and the alleged results.

However, no authentic, credible evidence was ever presented and admitted into the record to support such a recommendation, and Mrs. Yarbrough offered no credible evidence in support of her objection either the "evidentiary hearing." If not then, at what better time is there, to present, and rule upon the admission of evidence? Somehow, the hearing examiner not only (himself) moved into evidence, but admitted and relied upon the "Excel" spreadsheet – a document of unknown origin, prepared by an unknown individual, on an unknown date. The hearing examiner however, did not issue rulings upon Candidates' evidentiary objections, but merely glossed over all hearsay objections, by referencing Greene. However, as discussed above, *Greene* is a far-removed factual and evidentiary process.

Glaringly omitted, as the hearing examiner pointed out, is a certified statement from the election authority that maintains the voter registration database. The hearing officer noted that typically, when he has served in other electoral board matters, the election authority provides a certified statement regarding the "records examination" and the election authority's ultimate findings. No such statement or evidence was ever provided to Candidates, or their counsel.

D. <u>Objector Failed to Prove that Signatories Were Not Registered When They Signed.</u>

As the hearing officer noted, "qualified voters" are voters who are registered when the sign a petition sheet. 10 ILCS 5/3-1.2. There is no other relevant time at issue for such a review, but the date on which each voter signed Candidates' petition.

However, neither the SOEB, nor Mrs. Karen Yarbrough, the objector, have offered any credible evidence, or even voter histories, to corroborate Mrs. Yarbrough's otherwise unsupported accusations that somehow, voters were not registered, or did not sign in their own proper person. As such, it was error for the hearing examiner to deny Candidate' motion to dismiss – Mrs. Yarbrough's objector's petition contains no assertion that voters were not registered on the dates each signed, and it goes without saying, that Mrs. Yarbrough herself an elected official, would not have had the time or ability to review signatures on her own. Presumably, she was on the public payroll during regular working business hours, and would not have engaged in partisan activity of a personal nature.

The SOEB database contains no voter histories, or changes in voter registrations (as asserted by Candidates in their motion to strike and throughout the proceedings). Furthermore, as discussed herein, the SOEB/ISBE's database is inherently unreliable in that it is hearsay within hearsay, and that it has none of the traditional safeguards or even logs, to track changes that are made on a daily basis by various election authorities. It goes without saying, that a banking system would not last long if it relied upon such a scheme, with no logs, or "fingerprints" of those changing or manipulating this database. There are none of the traditional hallmarks of reliability.

As discussed in the Candidates' Rule 9 motions, the SOEB/ISBE is not statutorily vested with the authority to use the ISBE database in the manner and for the purpose that the SOEB is using the database

herein. The SOEB and ISBE, being creatures of statutory creation, and limited to the statutes which empower and create each. No authority is given to either to undertake a "records examination" which could be performed by the various election authorities that maintain original voter registration documents and voter histories.

E. Open Meetings Act Violations.

Electoral Boards are public bodies, and are subject to the provisions of the Illinois Open Meetings Act, 5 ILCS 120/1, et seq., as confirmed by the First District Appellate Court, in its decision *Bernadette Lawrence v. Kenneth Williams, et al.,* 2013 ILApp (1st) 130757 (April 9, 2013). The Illinois Open Meetings Act also allows a party that substantially prevails to recover its attorney's fees and costs, 5 ILCS 120/3(d).

The SOEB did not continuously post its agenda, and the SOEB Rules, for 48 hours prior to its meeting on July 14, 2014. As such, the SOEB violated the Open Meetings Act by holding a meeting without 48 hours continuous notice.

In addition, the SOEB did not list public participation on the agenda for the July 14, 2014 meeting, or allow public comment at the July 14, 2014 meeting. Candidates would have asserted that the Rules proposed by the SOEB were violative of their due process rights, and imposed unrealistic and impossible burdens on their rights to ballot access, and the associational rights of all voters who signed their petition sheets desirous of forming a "new" political party.

The Open Meetings Act violations are in addition to the cumulative effects of the SOEB's refusal and failure to provide a line-by-line listing of its rulings, in a proof-read, computer-generated printout, as well as failure to rule upon and address Candidates' pending motions.

F. Conclusion.

For the foregoing reasons, Candidates respectfully request that Objector, Karen Yarbrough's, objection be overruled, and Candidates' names be printed upon the ballot for the November 4, 2014 general election ballot.

WHEREFORE, Candidates, through counsel, respectfully request that the hearing examiner's recommendation be over ruled, and that Candidates' names be printed upon the ballot for the November 4, 2014 general election, and for any other such relief in favor of Candidates that is just and equitable to address the procedural due process violations and failure of Objector to meet her burden of proof, including overruling of Objector's petition.

Respectfully submitted:

By: _____
Attorney for Objector

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Certificate of Filing and Service

The undersigned, an attorney, certifies that he filed and served (via email) upon opposing counsel, Mike Kasper and Brett Bender, and the State Officers Electoral Board c/o: Steve Sandvoss, general counsel, a copy of the ***Candidates' Exceptions to Hearing Examiner's Recommendations*** on August 19, 2014.

By: _____
Attorney for Objector

STATE OF ILLINOIS
COUNTY OF SANGAMON

BEFORE THE STATE BOARD OF ELECTIONS
OF THE STATE OF ILLINOIS

Illinois State Board of Elections,
Complainant

v. **14 CD 070**

Taking Back America, ID# 24494
Respondent.

REPORT OF HEARING EXAMINER

This hearing was held as a result of a Complaint filed pursuant to "An Act to Regulate Campaign Financing" (Illinois Compiled Statutes, 10 ILCS 5/9-1, et seq., (hereafter referred to as the Act) alleging that the Respondent violated 10 ILCS 5/9-10. Specifically, the Respondent failed to file the September 2013 and December 2013 Quarterly Reports of Campaign Contributions and Expenditures.

STATE'S EXHIBITS

To be made a part of this report, a copy of the D-4 Complaint for Violation of the Campaign Disclosure Act, filed on March 27, 2014, at the Board's Springfield office, 2329 S. MacArthur Blvd., Springfield, IL 62704; Notice and Summons regarding the Complaint; Notice of the Closed Preliminary Hearing; Hearing Officer's Report from the Closed Preliminary Hearing; Board Order finding that the Complaint was filed on justifiable grounds and ordering a Public Hearing be held; and Notice of the Public Hearing.

COMPLAINANT'S CASE-IN-CHIEF

The Respondent filed a Statement of Organization on August 17, 2012 with the purpose of informing and educating voters. The Respondent most recently filed a Final Report on June 23, 2014, which shows a zero balance. The Board's staff has repeatedly contacted the Respondent's officers to no avail, leading to the filing of the instant Complaint.

RESPONDENT'S CASE-IN-CHIEF

The Respondent did not appear at the Public Hearing and was provided adequate notice. The Respondent also failed to appear at the Closed Preliminary Hearing on this matter and has not attempted to communicate its bases for failing to file the required reports.

CONCLUSIONS AND RECOMMENDATIONS

Despite the Respondent's failure to appear for the scheduled hearings on this matter, in light of the filing of the Final Report showing a zero balance, I recommend that the Board accept the Final Report in lieu of the delinquent quarterly reports. I further recommend that the Complaint be dismissed and no further action be taken by the Board other than referral of the matter to appropriate staff for the assessment of civil penalties related to the late filing of the reports.

Bernadette Harrington – Hearing Officer
August 14, 2014

STATE BOARD OF ELECTIONS

From the desk of…. Kyle Thomas
Director of Voting and Registration Systems
Phone: 217-782-1590
Email: kthomas@elections.il.gov

To: Rupert T. Borgsmiller; Executive Director

Re: Dominion Interim Approval

Date: August 19, 2014

An Illinois election equipment vendor, Dominion Voting Systems, Inc. has requested approval for an increased capacity, commercial off the shelf (COTS) 8GB USB memory stick in order to store the increasing number of ballot styles the jurisdictions are encountering due to the influence from multiple language ballots. This is a modification to the Edge2plus (E2P), Dominion's Direct Recording Electronic (DRE) tabulator and Hybrid Activator, Accumulator and Transmitter (HAAT) for the Integrated System WinEDS 4.0/Democracy Suite 4.6 which received an Interim Approval from the Board in September of 2012. This system is composed of the following components:

a. E2P-v. 1.2.77
b. HAAT- v. 2.6.39
c. Insight- v. HPX K1.44.080501.1500, APX K2.16.090716.1500
d. MPR- v. 3.01.08.0422.0552
e. 400C/WinETP- v. 1.16.15
f. HAAT Listener- v. 1.7.4
g. WinEDS EMS Software- v. 4.0.175
h. WinEDS Extended Services-v. 1.0.81
i. Democracy Suite EMS Software- v.4.6.07
j. ICP-4.6.4
k. ICC- v. 4.6.3/COTS Canon DR-X10C
l. DVS Card reader- v. 1.0.8.50
m. Ballot Box- 180-000010

Dominion conducted testing of the SanDisk Cruzer 8GB memory stick prior to arrival at our facilities. Their testing was documented and submitted to SLI Global Solutions, an accredited Voting System Test Laboratory (VSTL) for review. SLI initially found Dominion's testing to be adequate and so the process of our review and testing began.

Paper ballots for the system currently in use, the Insight and 400C as well as paper ballots for the more recent but not currently customer used ImageCast In-Precinct (ICC) and ImageCast Central (ICP) tabulators were delivered to our Springfield facility the second week of July. BOE staff reviewed and marked the ballots with assistance from vendor supplied temporary employees in preparation for conducting the test later that week. Upon arrival of Dominion staff, equipment was set up and prepared. The E2P and

HAAT's were assembled and immediately the Dominion employees realized that the 8GB sticks were having an issue. The E2P's recognized them however; the HAAT was unable to connect to the 8GB stick in order to receive the ballot information contained within. After running diagnostics and making calls to the technicians, the Dominion staff determined that the HAAT was very sensitive to which format the sticks were prepared. It was decided further testing was necessary by the vendor before we could proceed with the E2P and HAAT portion of this campaign.

While troubleshooting was underway for the 8GB sticks, BOE staff continued the process by proofing and running all paper ballots for the ICC (638 ballots) and ICP (638 ballots) tabulators, to later be merged with results from the E2P's. During the proofing, a tear on several ballots prevented them from being run through the ICC machine. These ballots were remade and an additional 550 ballots were run as there was concern that the ICC scanner may have caused the tear. We were unable to recreate the issue. In addition, the Insight ballots (264 ballots) were sent to Chicago for proofing on the 400C and tabulation on the Chicago Board of Election's Insight equipment, as they agreed to supply equipment for Dominion to use in this approval. We were also able to inspect a new style ballot box and determined it to be secure for use.

Dominion found that the format of the 8GB sticks must be set to FAT instead of the default FAT32, in order for the HAAT to recognize the device. They sent their findings back to the VSTL and SLI performed their own testing and verified that FAT was necessary.

Dominion staff returned to our Springfield office the first full week of August, in order to finalize the tabulation on the E2P's. We confirmed that in the FAT format, the HAAT's were now able to recognize the memory device and receive the ballot styles for voting. Once underway with tabulation, we found that the E2P's would on occasion display an error message of "Results Cartridge Removed. Service Required." This occurred on all six machines being tested and more than once on several of the machines. This message appeared after a ballot was completed and the machine was preparing for the next voter to arrive. Results were not affected by the error message. Dominion staff rebooted the individual machine which cleared the message and allowed voting to continue as normal. The frequency that this appeared was not overwhelming, however it was cause for concern, as we had not encountered this message in previous testing of the 1GB stick currently in use. Dominion staff suspected that the error message was related to the Windows operating system they used to format and load the information onto the devices, so instead of using Windows 7, they switched to laptops running Windows XP. After further testing, this proved to make no difference and we still encountered the message. In all, 812 ballots were cast on the E2P's, 406 in Early Voting Mode and 406 in Election Day Mode. Several marking errors were encountered and each was verified to be human error. Precincts were rerun to correct these human errors.

The following week, I was joined by fellow BOE staff members in the Chicago Board of Elections' facilities to witness the merging of results which we had generated in the prior weeks' tabulation. We wanted to verify that the HAAT's, which are not only utilized to create the card a voter would insert into an E2P which determines their ballot style but are also used to transmit results, properly transmitted the results remotely into the main counting facility for merging with onsite loaded results. This merging went well with half the precincts being remotely loaded from Chicago's warehouse and half being loaded onsite in their main facility. The only issue encountered was with a connection of one of the Insight's data cartridge receptacle "pin" boards. It was determined that the

board, which is used to connect the Insight to the HAAT via a cable, needed replacement. Once the part was replaced, transmitting resumed and was completed accurately. All results were reviewed and no tabulation issues were identified. The total ballots cast for this test was 2,352.

After discussions with Cook County and City of Chicago personnel as well the vendor, it was explained that the error message displayed by the E2P's is a message they have encountered in the past using the 1GB sticks, however at less frequency than we saw during our tests. No solid explanation has been given and this will be monitored closely.

As the Director of the Voting and Registration Systems Division, it is my recommendation that the Board grant a two-year Interim Approval for the above described integrated voting system with a restriction on the use of the 8GB memory sticks. This restriction would be to limit the 8GB sticks to Early Voting and restrict them from Election Day use, at this time. I recommend that the vendor and/or election jurisdictions provide specific training to election judges stationed at these sites as to the procedures necessary to overcome the error message encountered, should it occur.