SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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KATHY WILSON, MARY ANNE HICKS and ROBERT CONTE,

Petitioners-Objectors,

- and -

CARL MARCELLINO,

Petitioner-Candidate Aggrieved,

- against -

GEORGINA BOWMAN,

Respondent-Candidate,

- and -

GREGORY PETERSON, JAMES WALSH, DOUGLAS KELLNER and ANDREW SPANO, Commissioners constituting the NEW YORK STATE BOARD OF ELECTIONS,

Respondents.

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NOTICE OF MOTION

Index No. 8640/2014

Assigned to:
Hon. F. Dana Winslow, J.S.C.

ORAL ARGUMENT IS REQUESTED

PLEASE TAKE NOTICE that upon the affirmation of Gary L. Donoyan, affirmed on September 15, 2014, and upon the exhibits annexed thereto, and upon all proceedings herein to date, the respondent-candidate GEORGINA BOWMAN will move in this Court at 9:30 a.m. on the 23rd day of September 2014, at the Courthouse, 100 Supreme Court Drive, Mineola, New York, in IAS Term Part 3, for (1) an order pursuant to CPLR Rule 3211(a)(5) dismissing the petition herein on the ground that the proceeding was not instituted within the time required by the statute of limitations, or, in the alternative, (2) an order pursuant to CPLR Rule 3211(a)(8) dismissing the petition herein on the ground that the petition purportedly served was not properly verified, thus personal jurisdiction was not

obtained, or, in the alternative, (3) an order pursuant to CPLR §510(1) and Rule 511(b) changing the place of trial of the proceeding to Albany County on the ground that Nassau County, which was designated by petitioners, is not a proper county, and granting such other and further relief as this Court may deem just and proper.

The above entitled proceeding is to direct the invalidation of a nominating petition for a candidate for public office.

Dated: Manhasset, New York
September 15, 2014

THE LAW OFFICE OF GARY L. DONOYAN

By: Gary L. Donoyan
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New York State Board of Elections
Respondents *pro se*
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Albany, New York 12207
(518) 474-6220

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AFFIRMATION IN SUPPORT

Index No. 8640/2014

Gary L. Donoyan, an attorney duly admitted to practice in the courts of the State of New York, affirms the truth of the following statements under the penalties of perjury:

1. I am the attorney for respondent-candidate GEORGINA BOWMAN ("Respondent-Candidate Bowman") in the above-entitled proceeding, and make this affirmation in support of Respondent-Candidate Bowman's motion for (1) an order pursuant to CPLR Rule 3211(a)(5) dismissing the petition herein on the ground that the proceeding was not instituted within the time required by the statute of limitations, or, in the alternative, (2) an order pursuant to CPLR Rule 3211(a)(8) dismissing the petition herein on the ground that the petition purportedly served was not properly verified, thus

personal jurisdiction was not obtained, or, in the alternative, (3) an order pursuant to CPLR §510(1) and Rule 511(b) changing the place of trial of the proceeding to Albany County on the ground that Nassau County, which was designated by petitioners, is not a proper county.

2. This proceeding was purportedly commenced by the filing of a proposed order to show cause and petition in the Supreme Court of New York, Albany County on September 2, 2014. Later on September 2, the order to show cause, granting leave to petitioners to make a delayed filing of the papers, and to permit the payment for and obtaining of an index number to made at the Nassau County Supreme Court, and directing the respondents – including respondent NEW YORK STATE BOARD OF ELECTIONS and the individual Commissioners respondents ("Respondent Board of Elections") – to appear at the Nassau County Supreme Court on September 5, 2014, was signed by the Hon. Gerald W. Connolly, Acting J.S.C. A copy of the order to show cause, emergency affirmation and petition is annexed hereto as **Exhibit 1**.

3. Respondent-Candidate Bowman's Verified Answer, including affirmative defenses and a counterclaim against all parties, together with a Demand for Change of Place of Trial, on the ground that the proper county of venue for this proceeding is Albany County, was duly served on all parties on September 4, 2014. An additional copy of each of those documents was also served on counsel for petitioners by your affirmant in hand at the initial hearing of this matter on September 5, 2014. A copy of those documents, with affirmations of service, is annexed hereto as **Exhibits 2** and **3**, respectively.

4. This proceeding was brought by petitioners, including petitioner CARL MARCELLINO ("Petitioner-Candidate Marcellino"), to declare "insufficient, defective, invalid, fraudulent, null, void and ineffective" the nominating petition filed with Respondent Board of Elections on August 19, 2014 to qualify Respondent-Candidate Bowman for the ballot for the office of New York State Senator for the 5th District, in the general election to be held on November 4, 2014, and to enjoin Respondent Board

of Elections from placing Respondent-Candidate Bowman's name on the said ballot. As of September 5, 2014, the initial hearing date in this proceeding, Respondent Board of Elections had not ruled on the objections filed therein by petitioners KATHY WILSON, MARY ANNE HICKS and ROBERT CONTE ("Petitioner-Objectors"), and according to its published calendar, Respondent Board of Elections will not make a final decision with regard to the said objections until September 26, 2014 at the earliest. The instant proceeding is in the nature of a preemptive appeal by petitioners, in the event Respondent Board of Elections rules in favor of Respondent-Candidate Bowman to validate her nominating petition, brought prior to its ruling in an attempt to comply with the statute of limitations imposed by New York law. As set forth below, petitioners have failed to comply with the requirements of New York law with regard to the verification of their petition, and with regard to the time of institution of the proceeding, and have also brought the proceeding in the wrong county.

POINT I: THE PETITION HEREIN SHOULD BE DISMISSED BECAUSE THE PROCEEDING WAS NOT TIMELY INSTITUTED.

5. The instant motion is made pursuant to CPLR Rule 3211(a)(5), on the ground that petitioners' cause of action may not be maintained because it was instituted past the time required by the applicable statute of limitations. Respondent-Candidate Bowman preserved her right to make this motion by raising the defense in her second, third and/or fourth affirmative defenses, timely served herein. The applicable statute is Election Law §16-102, which provides:

> **§16-102. Proceedings as to designations and nominations, primary elections, etc.**
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> ...
>
> 2. A proceeding with respect to a petition shall be instituted within fourteen days after the last day to file the petition, or within three business days after the officer or board with whom or which such petition was filed, makes a determination of invalidity with respect to such petition, whichever is later; ...
>
> ...

"The last day to file the [nominating] petition" with Respondent Board of Elections was August 19,

2014. Election Law §6-158(9). Fourteen days thereafter was September 2, 2014, which is therefore the date by which this proceeding was required to be "instituted."

6. Unlike other special proceedings, Election Law proceedings are not instituted upon the filing of the petition or order to show cause with the Clerk of the County in which said proceeding is brought. "To properly institute the proceeding, '[a] petitioner raising a challenge under Election Law §16-102 must commence the proceeding and complete service on all the necessary parties within [that [fourteen day]] period.'" Matter of Kurth v. Orange County Bd. of Elections, 65 A.D.3d 642, 643, 883 N.Y.S.2d 908 (2nd Dept. 2009), quoting Matter of Wilson v. Garfinkle, 5 A.D.3d 409 (2nd Dept. 2004) and citing Matter of King v. Cohen, 293 N.Y. 435 (1944), Matter of McDonough v. Scannapieco, 65 A.D.3d 647 (2nd Dept. 2009), and Matter of Davis v. McIntyre, 43 A.D.3d 636 (4th Dept. 2007), emphasis added. Service by affixing the papers to the door of the respondent's residence and mailing on the last day that service could be made is "inadequate and ineffectual" to institute such a proceeding. Kaplan v. Bucha, 207 A.D.2d 509, 510, 615 N.Y.S.2d 933 (2nd Dept. 1994), *leave to app. den.*, 84 N.Y.2d 821, 641 N.E.2d 148, 617 N.Y.S.2d 128 (1994), citing Matter of Buhlmann v. LeFever, 83 A.D.2d 895, 442 N.Y.S.2d 529 (2nd Dept. 1981), *aff'd* 54 N.Y.2d 775, 443 N.Y.S.2d 154, 426 N.E.2d 1184. "Language with regard to service contained in the order to show cause that commenced the proceeding 'could not and did not extend the period of limitations within which to institute the proceeding within the meaning of the Election Law.'" Matter of McDonough, *supra*, 65 A.D.3d at 648-49, citations omitted.

7. The order to show cause signed by Justice Connolly on September 2, 2014 made the following provisions for its service by petitioners:

> ORDERED, that service of a copy of this order, together with a copy of the papers upon which it is granted, on the Respondent NEW YORK STATE BOARD OF ELECTIONS, and the Commissioners thereof be made by leaving a copy of said order and papers at the Offices

> of the said NEW YORK STATE BOARD OF ELECTIONS, or by delivering same to any one of the Commissioners of Elections of the said Board, or any other officer of said Board authorized to accept service, on or before the 2nd day of September, 2014, or alternatively, at the option of the petitioners, same may be served by electronic transmission thereof to the said Board or, at the option of the petitioners, same may be served by enclosing said papers in a post paid wrapper addressed to Respondent Board of Elections and deposited with a depository of the United States Postal Service via EXPRESS MAIL on or before the 2nd day of September, 2014, and affixing same to the entranceway of the offices of said Board in the event that the offices thereof are closed, and further
>
> That service of a copy of this Order to Show Cause, together with a copy of the papers upon which it is granted, upon the Respondent-Candidate, be made by one of the following methods at the option of the petitioner(s):
>
> (1) by delivering the same to such Respondent Candidate personally pursuant to CPLR 308(1) on or before the 2nd day of September, 2014; or
>
> (3) by affixing the same to the outer or inner door of the residence of such Respondent Candidate at the address set forth in his [sic] Independent Nominating petition, AND by enclosing the same in a securely sealed and duly prepaid wrapper, addressed to the Respondent Candidate at the address set forth in his [sic] Independent Nominating petition, and depositing the same with a depository of the United States Postal Service via Express Mail on or before the 2nd day of September, 2014; or
>
> (4) by delivering the same to a person of suitable age and discretion at the address of such Respondent Candidate AND by enclosing the same in a securely sealed and duly prepaid wrapper, addressed to such Respondent Candidate at the address set forth in his or her Independent Nominating petition for the Libertarian Independent Party, and depositing the same with a depository of the United States Postal Service via Express Mail, on or before the 2nd day of September, 2014; or
>
> and that such service shall be deemed due, timely, good and sufficient service thereof, and such service shall constitute good and sufficient notice hereof.

See Exhibit 1.

8. Although the order to show cause provides for "nail and mail" service, in the alternative, on both respondents, since the order was signed on the last day to complete service, such service, pursuant to the authorities cited above and despite the language of the order, would have been

"inadequate and ineffectual" to institute this proceeding. Kaplan v. Bucha, id.

9. Based on information and belief, petitioners failed to complete service timely on either Respondent Board of Elections or Respondent-Candidate Bowman. Respondent-Candidate Bowman did receive a copy of the order to show cause and petition by Express Mail, on September 4, 2014, two days after the legal deadline for such service, and just one day prior to the initial hearing of this matter. A copy of the Express Mail transmittal and postmark, indicating a mailing by petitioners' counsel at 7:08 p.m. on September 2, 2014 by "2-Day" delivery, is annexed hereto as **Exhibit 4**.

10. Since timely service on BOTH parties was required in order properly to institute this proceeding, a failure to timely service EITHER respondent would require the dismissal of petitioners' claim. Since one or both of Respondent-Candidate Bowman and, based on information and belief, Respondent Board of Elections, were not timely served, Respondent-Candidate Bowman's motion to dismiss this proceeding for failure to meet the requirements of the statute of limitations should be granted.

POINT II: IN THE ALTERNATIVE, THE PETITION HEREIN SHOULD BE DISMISSED BECAUSE THE PETITION WAS NOT PROPERLY VERIFIED.

11. This portion of the instant motion is made pursuant to CPLR Rule 3211(a)(8), in the alternative, on the ground that the court has not jurisdiction of the person of either respondent, because the petition filed and purportedly served in this proceeding was not properly verified as required by law. Respondent-Candidate Bowman preserved her right to make this motion by raising the defense in her first and/or seventh affirmative defenses, timely served herein. The applicable statute is Election Law §16-116, which provides:

> **§16-116. Proceedings; provisions in relation thereto**
> A special proceeding under the foregoing provisions of this article shall be heard upon a verified petition and such oral or written proof as may be offered, and upon such notice to such officers, persons or committees as the court or justice shall direct, and shall be summarily

determined. ...

12. CPLR §3020(d) permits the attorney for the parties to make the verification, if the parties are "united in interest" and "none of them acquainted with the facts is within ... the county where the attorney has his office." CPLR Rule 3021 requires the maker of the verification, if not the party, to set forth in the affidavit "the reason why it is not made by the party."

13. The verification included in the papers filed and purportedly served herein includes the following allegation, affirmed on September 1, 2014 by John Ciampoli, Esq., counsel for petitioners:

> 5. This verification is used [sic] pursuant to the provisions of the CPLR at [sic] counsel has offices in the County of Suffolk and the Petitioners herein are residents of the County of Nassau.

See Exhibit 1.

14. Initially, the verification is inadequate because the place where the parties, and each of them, are "residents" is not relevant to why the verification is not made by the parties, or any of them. CPLR Rule 3021. The verification herein gives no indication where the petitioners, or any of them, were at the time the verification was signed on September 1, 2014.

15. In addition, two of the petitioners – petitioners MARY ANNE HICKS and ROBERT CONTE – are residents of Suffolk County, according to the records of the Suffolk County Board of Elections, which include the full names of both said petitioners, enrolled Republicans, with residence addresses in the 5th Senate District. A copy of a spreadsheet created from the CD records of the Suffolk County Board of Elections, including all publicly available information about the said two petitioners, is annexed hereto as **Exhibit 5**.

16. Also served upon counsel for petitioners with the instant motion papers, are trial subpoenas for the said two petitioners, directing their appearance in this Part at 9:30 a.m. on September 23, 2014, the return date of this motion, served pursuant to CPLR §2303-a. A copy of the said

subpoenas is also annexed hereto as **Exhibit 6**.

17. The petition herein is not properly verified for two separate and independent reasons: (1) it does not set forth a valid reason why it was not made by a party, and (2) at least one of the petitioners was apparently in Suffolk County on September 1, 2014, when the purported verification was signed by their counsel. Respondent Candidate Bowman's motion, in the alternative, to dismiss the petition based on lack of personal jurisdiction should be granted, because no properly verified petition was timely served.

POINT III: IN THE ALTERNATIVE, THE PLACE OF TRIAL OF THIS PROCEEDING SHOULD BE CHANGED TO ALBANY COUNTY BECAUSE NASSAU COUNTY, DESIGNATED BY PETITIONERS, IS NOT A PROPER COUNTY.

18. This portion of the instant motion is made pursuant to CPLR §510(1) and Rule 511(b), in the alternative, on the ground that Albany County is the correct venue for this proceeding, and Nassau County is not. Respondent-Candidate Bowman preserved her right to make this motion by raising the defense in her ninth affirmative defense, and in her Demand for Change of Place of Trial, both timely served herein, by mail on September 4, 2014 and to petitioners' attorney in hand on September 5, 2014. As of the date of service of the instant motion (September 15, 2014), Respondent-Candidate Bowman has not received a response to her Demand for Change of Place of Trial from petitioners pursuant to CPLR Rule 511(b).

19. The applicable statute is CPLR §505(a), which provides that "[t]he place of trial of an action by or against a public authority constituted under the laws of the state shall be in the county in which the authority has its principal office or where it has facilities involved in the action." Also applicable may be CPLR §506, which provides:

> **§506. Where special proceeding commenced**
>
> (a) Generally. Unless otherwise prescribed in subdivision (b) or in the law authorizing the proceeding, a special proceeding may be commenced in any county within the

judicial district where the proceeding is triable.

(b) Proceeding against body or officer. A proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place, or where the principal office of the respondent is located, …

See also Uniform Civil Rules for the Supreme Court and the County Court, 22 NYCRR §202.64, which provides:

§202.64. Election Law Proceedings

(a) All applications to the Supreme Court, or to a judge thereof, pursuant to the Election Law, shall be made at the special part designated for such proceedings and where there is no special part, before the judge to whom the proceeding is assigned. As far as practicable, the application shall be brought in the county in which it arose.

…

Emphasis added.

20. As held by the Second Department in Llorca v. Manzo (254 A.D.2d 396, 679 N.Y.S.2d 82 (2nd Dept. 1998)), when the plaintiff's (or petitioner's) choice of venue is improper, their right to select the place of venue is forfeited. 254 A.D.2d at 397. The court also held that, because the defendant (or respondent) had timely moved for a change of venue to a proper venue, that motion should have been granted. Id.

21. If Respondent Board of Elections is deemed to be a "public authority," venue of this proceeding is proper only in Albany County, where it "has its principal office" and where "it has facilities involved in the action." CPLR §505(a). If this proceeding is deemed to be one against a body or officer, insofar as the respondents thereto include Respondent Board of Elections and its individual Commissioners, venue of this proceeding is also proper only in Albany County, where Respondent

Board of Elections will or may make "the determination complained of," and where the relevant "proceedings" of Respondent Board of Elections were brought, and where "the material events" took place or will take place, and where the principal office of Respondent Board of Elections is located. CPLR §506(b). The proceeding clearly "arose" in Albany County, where Respondent-Candidate Bowman's nominating petition was filed, and where Respondent Board of Elections will make its determination as to its validity. 22 NYCRR §202.64(a).

22. Respondent-Candidate Bowman's motion, in the alternative, to change the place of trial of this proceeding to Albany County, on the ground that Nassau County is not a proper county, should be granted.

WHEREFORE, Respondent-Candidate Bowman respectfully requests that this Court grant her motion to dismiss based on petitioners' failure to institute the proceeding within the time required by the statute of limitations, or in the alternative that this Court grant her motion to dismiss based on lack of personal jurisdiction due to failure to serve a properly verified petition, or in the alternative that this Court grant her motion to change the place of trial to Albany County, together with such other and further relief as this Court finds just.

Affirmed on 15 September 2014

Gary Donoyan