PRELIMINARY STATEMENT

Petitioners seek review of an Order of Hon. Lawrence E. Kahn, granting the motion of Respondent Colavita (par. 14 of his Answer) to dismiss the proceeding on the ground that the Petition fails to state a cause of action. This proceeding, commenced under Article 16 of the Election Law, by Order to Show Cause and Petition, seeks to invalidate Republican and Democratic Party Certificates of Nomination insofar as they purport to nominate Respondents Nicolai and Miller for two vacancies in the office of Supreme Court Justice of the Ninth Judicial District, to be voted for in the general election on November 6, 1990. The Petition further seeks to invalidate the nomination of Respondent Emanuelli to fill the vacancy in the office of Surrogate of Westchester County, likewise to be voted for in said election.

The Lower Court made the following errors--which separately and collectively, require reversal and this Court's immediate remedial action:

(1) it erred in summarily holding that Petitioners did not state a cause of action;

(2) it erred in failing to accept as true all Petitioners' factual allegation and inferences therefrom, as required by law on a motion to dismiss;

(3) it erred in finding, as a matter of law, that the mandates of the Election Law had been followed at the Judicial Nominating Conventions in question, contrary to Petitioners' allegations;

(4) it erred in ignoring the issue of whether the

subject cross-endorsement agreement constituted an illegal contract; and

(5) it erred in declining to review the legality of the subject agreement based on its erroneous finding that mandated procedures of the Election Law were followed.

This Court should note that although the issues covered in Points III through VI herein were not addressed by the Lower Court, they are included in this Brief soley to put on record that the Affirmative Defenses raised by the Respondents are devoid of merit.

QUESTIONS PRESENTED

1. Does the illegality of the cross-endorsements agreement in issue, and the implementation thereof, taken in its totality, become purified by putting it through the process of Judicial Nominating Conventions, which Petitioners' allegations and the supporting proof, undisputed by Respondents, show were not conducted in accordance with the mandatory safeguards of the New York State Election Law.

The Lower Court held that once Election Law requirements were met through Judicial Nominating Conventions, judicial relief could not be granted, and, notwithstanding contrary allegations in the Petition, summarily found that such requirements had been met.

2. Is a cause of action stated by a Petition alleging that:

(A) Respondents, two major political parties, their leadership, their judicial nominees, and others, entered into an agreement:

> (i) to exchange Supreme Court, Surrogate Court, County and Family Courty Judgeships, over a three-year period, including creating contracted-for resignations by the proposed judicial nominees, as well as the pledge of such nominees, once elected, to split equally

their future judicial appointments in accordance with the recommendations of such party leaders; and

(ii) caused such agreement to be adopted in written resolution form by the Executive Committees of their respective parties; and

(iii) implemented such agreement by nominating the proposed judicial nominees at their respective judicial nominating conventions, which were deliberately conducted in a manner violating mandatory Election Law safeguards; and

(B) assured the "election" of such judicial nominees in the general elections, to be held on November 6, 1990, by running an identical slate of judicial candidates on the ballot of the two major political parties; and

(C) effectively disenfranchised the voting public of rights guaranteed under the Constitution of the State of New York and the New York State Election Law

The Lower Court answered "No", held, as a matter of law, that such Petition did not state a cause of action entitling Petitioners to judicial relief and dismissed the Petition.

STATEMENT OF FACTS

At various times and places in or about 1989, the two Chairmen of the Westchester Republican and Democratic County Committees, ANTHONY COLAVITA ("COLAVITA") and RICHARD WEINGARTEN ("WEINGARTEN"), with the aid and assistance of their respective legal counsel, GUY PARISI, Esq. and LOUIS A. BREVETTI, Esq., negotiated a barter agreement (herein called "the Three Year Plan"). The terms and conditions thereof were reconfirmed, spelled out, memorialized and documented in the Resolution (Exhibit "G" to the Petition), adopted by the Executive Committees of the Republican and Democratic County Committees of the five counties comprising the Ninth Judicial District, prior to the 1989 Judicial Nominating Conventions. The Three Year Plan was also agreed to, approved and ratified by the 1989 judicial nominees for Ninth Judicial District, Republican ALBERT J. EMANUELLI, Esq., Republican HON. JOSEPH J. JUIDICE, and Democrat SAMUEL G. FREDMAN, Esq.

In exchange for agreed-upon cross-endorsements, the leaders of the Republican and Democratic Parties in the Ninth Judicial District struck the following bargain:

1. In 1989, one Democratic Supreme Court judgeship was to be traded for two Republican Supreme Court judgeships, with an identical slate comprised of the three aforementioned agreed-upon judicial

nomiminees to appear on the Republican and Democratic lines at the 1989 general election consisting of Republican EMANUELLI, Republican JIUDICE, and Democrat FREDMAN.[1]

2. In 1990 (assuming their politically guaranteed election in 1989), Republican EMANUELLI would resign from the office of Supreme Court judge, to which he had been elected for a 14-year term, so that he could run for Surrogate of Westchester County (and thereby preserve the substantial patronage of that office for the Republicans, subject to the sharing pledge, hereinafter described). In return, sitting Democratic Westchester County Judge, Hon. FRANCIS A. NICOLAI, would move up to the seat on the Supreme Court, which the Republican EMANUELLI had contractually bound himself the year before to vacate by resignation.

3. In 1991 (assuming the politically guaranteed judicial elections in 1990) the vacancy created by the contracted-for elevation of Democrat

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[1] Both Republican EMANUELLI and Democrat FREDMAN were practicing lawyers, without any previous judicial experience, but with considerable political experience. Republican EMANUELLI had worked closely with Mr. COLAVITA on election matters for a number of years. Democrat FREDMAN had served as Chairman of the Westchester Democratic County Committee for a number of years.

NICOLAI would be filled by cross-endorsing T. EMMET MURPHY, a sitting Democratic City Court Judge from Yonkers, and cross-endorsing Hon. ADRIENNE SCANCARELLI, a Republican, who would then be re-elected as a Westchester Family Court Judge.

Over and beyond the foregoing contractual provisions, each judicial nominee was required to, and did, pledge to commit themselves that once elected, all their judicial appointments would effectively be divided equally between Republicans and Democrats, in accordance with the recommendations of the party leaders. (See penultimate paragraph of Exhibit "G")

At the 1989 general elections, pursuant to the aforesaid Three Year Plan, the identical, contracted-for judicial nominees for that year, appeared on the ballot, without major party opposition. The aforesaid initial candidates, Republican EMANUELLI, Republican JIUDICE, and Democrat FREDMAN, were elected and, thereafter, inducted into office. Pursuant to the aforesaid contract and in furtherance thereof, in or about August 1990, Republican EMANUELLI was compelled to, and did, resign his position as Justice of the Supreme Court, to which he had been elected some eight months earlier for a 14-year term, in order to create the contracted for-vacancy for Democratic County Court Judge NICOLAI to move up to the Supreme Court, and to permit Republican EMANUELLI to become the candidate of both the

Republican and Democratic parties of Westchester County for the office of Surrogate of Westchester County. Subject to this lawsuit, the election of Republican EMANUELLI, now a private practitioner with a politically connected law firm, is politically assured in the general elections to be held in November 1990.

In 1990, another position became vacant on the Ninth Judicial District Supreme Court bench by reason of the retirement of Hon. THEODORE A. KELLY, a Rockland County Republican. In keeping with and in furtherance of the Three Year Plan, Republican HOWARD MILLER[2] became the cross-endorsed candidate for that Supreme Court position in exchange for, according to published news reports, a further agreement by the party leaders to cross-endorse three Democrats in 1991 for local government positions. Subject to the outcome of this lawsuit, Republican MILLER is politically assured of election at the general elections to be held in November 1990.

On September 18, 1990, COLAVITA convened the Ninth Judicial District Republican Nominating Convention. As shown on the face of the Certificate of Nomination, dated September 18, 1990, filed with the New York State Board of Elections, he was also the Permanent Chairman of the Convention, contrary to

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[2] Republican MILLER is a Rockland County practitioner who had previously resigned from the bench and became affiliated with a politically-connected Rockland County law firm.

relevant provisions of the Election Law, as set forth in Petitioners' Statement of Objections and Specifications of Objections (Exhibits "C" and "E" annexed to the Petition).

On September 24, 1990, DENNIS MEHIEL, then Chairman of the WESTCHESTER DEMOCRATIC COUNTY COMMITTEE, convened the Ninth Judicial District Democratic Nominating Convention. Contrary to relevant provisions of the Election Law, as set forth in Petitioners' Statement of Objections and Specifications of Objections, (Exhibits "D" and "F" annexed to the Petition), and contrary to the Certification, sworn to as true and correct by JAY B. HASHMALL, Esq., the Chairman and Presiding Officer of the 9th Judicial District Nominating Convention and MARC S. OXMAN, Esq., Secretary thereof, there was no legal quorum and no roll call taken to ascertain the existence thereof. As further set forth in Petitioners' said Exhibits "D" and "F", contrary to applicable Election Law provisions, adequate seating for the requisite number of Delegates and Alternate Delegates was not provided. Nor, as noted in Petitioners' Objections, was the number of Delegates and Alternates elected to the Convention in the proportion required by law.

The New York State Board of Elections, after denying Petitioners' request for a hearing on their Objections and Specifications thereto, ruled that Petitioners' Objections and Specifications went beyond the face of the Nominating

Certificates, and that, accordingly, Petitioners must seek judicial relief relative thereto.

POINT I

THE CROSS-ENDORSEMENTS CONTRACT IN ISSUE IS AN INVIDIOUS VIOLATION OF THE NEW YORK STATE CONSTITUTION, THE ELECTION LAW OF NEW YORK STATE, AND THE CODE OF JUDICIAL CONDUCT AND COURT RULES RELATIVE THERETO. AS SUCH, IT IS ILLEGAL, VOID, AND AGAINST PUBLIC POLICY.

New York law is well settled that:

> "...The general right to contract is subject to the limitation that the agreement must not be in violation of the federal or state constitutions, federal or state statutes, an ordinance of a city or town, or a rule of the common law." 21 NY JUR2d 543, Contracts, §137.

The illegality of a contract under New York contract law is defined as follows:

> "A contract's illegality may lie in its consideration, in a promise, or in its performance. An agreement to do an illegal act is illegal. Any act, promise, or agreement designed or intended to accomplish the furtherance or effectuation of an unlawful purpose is unlawful, and every such promise or agreement is void or unenforceable. If the effect of the agreement is to accomplish an unlawful purpose, the agreement will be declared illegal, regardless of the intention of the parties." 21 NY JUR2d supra, at p.544, Contracts, §138.

In defining what constitutes a violation of public policy, the New York courts have ruled that:

> "...No one can lawfully do that which has a tendency to be injurious to or against the public good or welfare...
>
> "Public policy is determined from a consideration of the Constitution, laws, court decisions, and course of administration...Where there are constitutional or statutory provisions, they govern as to what is the public policy. A state can have no public policy except what is to be found in its Constitution and laws...
>
> "The principle that contracts against public policy are void and unenforceable...is based upon the theory that such an agreement is injurious to the interests of society in general..." 21 NY JUR 2d, supra, at pp.551 & 552, Contracts §144."

The cross-endorsements contract in issue, embodying the "Three-Year Plan" of the party leaders, violates Article 6, §6(c) of the New York State Constitution requiring that, "The justices of the supreme court shall be chosen by the electors of the judicial district in which they are to serve. . . ." Those legislators who enacted Article 6, section 6 (c) of the New York State Constitution and its predecessor sections mandating the election of supreme court justices, intended that their nomination and election be meaningful and proper, untainted by the abuses of "irresponsible members of a party convention, acting under no official sanction." See Debates in the New York State Convention, 1846, Tuesday, September 1 at pp. 584, 585, and Wednesday, September 2, pp. 585-594. As Legislator Kirkland so eloquently stated during these debates, in opposition to election of judges:

> ". . . nominations to these offices would be made by party caucuses and conventions - that these assemblages, and the nominations they made, were very often the result of intrigue, of management, of personal and local arrangements and of contracts and bargains of mere politicians. All understood well too, the iron rule of these caucuses and conventions; their decrees were despotic, and political death awaited him who refused to them passive obedience. The consequence was, that to one case where these decrees are disregarded, there are ninety nine where they are implicitly obeyed by all party men. Indeed, (continued Mr. K.) strict adherence to `regular nominations' is the watchword of all parties, and has come to be regarded as an essential article of party faith. Thus, the nomination by the party happening at the time to have the majority, is tantamount for all practical purposes to the actual election, and thus in fact the irresponsible members of a party convention, acting under no official sanction, and assembled for a day or an hour and then disbursed to meet no more, will in fact appoint your judges. I prefer for this purpose a more responsible appointing power. . . ." Debates in the New York State Convention, 1846, supra, at p. 587.

Legislator Patterson expressed the ultimate will of this Convention when he stated, in support of the principle of an election of justices by

judicial district:

> ". . . The more the election was brought home to the people, the better candidates would be chosen to occupy this high station. In all the districts of the state, there were men well qualified to occupy the bench of the supreme court. Not the severest party screws would be able to bring the people to vote for a person who was not competent, merely because he was of their own political opinions. They would feel an interest in this question far outweighing mere political considerations." Debates in the New York State Convention, 1846, supra, at p. 589.

Patterson's view carried the day, and the resolution, calling for election of Supreme Court Justices by judicial districts, was adopted. The expressed intent was to aid the people in their election of the judicial candidates so they could elect the better candidates, promote a more actively involved electorate, and minimize the effect of the "party screws".

Calling for the judicial nomination of the candidate of one party expressly conditioned on the judicial nomination of the candidate of the other party, the cross-endorsements provision of the subject contract violates:

A. Article 6, section 6(c) of the New York State Constitution and, therefore, constitutes an illegal and void contract, 21 NY JUR2d, supra, at p.555, Contracts, §147, and

B. New York statutory law, specifically the penal provisions of Election Law §17-158, which state, in pertinent part:

"Any person who:

> "1. While holding public office or being nominated or seeking a nomination therefor, corruptly uses or promises to use, directly or indirectly, an official authority or influence possessed or anticipated, in the way of conferring upon any person, or in order to secure, or aid any person in securing, an office or public employment, or any nomination, confirmation, promotion or increase of salary, upon consideration that the vote or political influence or action of the person so to be benefited or of any other person, shall be given or used

"in behalf of any candidate, officer or party, or upon any other corrupt condition or consideration; or,

* * *

"3. Makes, tenders, or offers to procure, or cause any nomination or appointment for any public office or place, or accepts or requests any such nomination or appointment, upon the payment or contribution of any valuable consideration, or upon an understanding or promise thereof...

* * *

"is guilty of a felony."

The instant cross-endorsements contract - adopting the party leaders' Three-Year Plan and calling for the resignation of Respondent Albert Emanuelli (a Republican) in 1990 after his election in 1989 to a 14 year term of office to permit him to then run for Surrogate of Westchester County, and in order to elevate Respondent Nicolai (a Democrat) to the Supreme Court Bench - violates Election Law §17-158, paragraph 1, because respondent party leaders and respondent judicial nominees did, in fact, use their influence in corruption of the judicial election process, assuring their nomination, and ultimately certain election, as judges, and increasing their influence as party leaders. The consideration the Democratic and Republican party leaders gave to each other was a bargained-for exchange of political influence and, as such, was corrupt and unlawful, being a "valuable consideration" within the letter and spirit of the aforesaid penal provisions of the Election Law. Each party leader agreed with the other, in sum and substance, that "I will endorse your candidates <u>if</u>, <u>and only if</u>, you endorse my candidates," - the end result being that there would be an identical slate of judicial candidates on the ballot of both major parties, and

the intended effect being to deprive the voters of a meaningful "election" of these candidates in violation of Article 6, §6(c) of the New York State Constitution. The voters, having been denied their constitutional right to elect between the judicial Republican and Democratic nominees, have been disenfranchised.

This illegal cross-endorsements contract also specifically violates paragraph 3 of §17-158 of the New York State Election Law. The respondent party leaders and respondent judicial nominees made a deal, consisting of promises and guarantees to each other that each would cross-endorse and guarantee the nomination and election of each other's candidates to achieve an identical slate of judicial candidates on the Republican and Democratic slates over a three-year period! As stated, these mutual promises and guarantees constitute "valuable consideration" for the illegal and corrupt bargain made by the respondent political bosses and judicial nominees.

The New York State courts have interpreted Election Law §17-158, and its predecessor (Election Law §448), liberally and broadly to prohibit political office-holders, nominees, and bosses and power brokers from making corrupt bargains or otherwise corruptly using their authority, People v. Hochberg, 87 Misc 2d 1024 (Sup. Ct., Albany Co. - 1976), aff'd 62 AD2d 239 (3rd Dept. - 1978); People v. Burke, 82 Misc 2d 1005 (Sup. Ct., New York Co. - 1975). The same is true of former §775 of the Penal Law, former §421 of the Election Law, and its predecessor (§751 of the former Penal Law); People v. Lang, 36 NY2d 366, 370 (1975); People v. Willett, 213 NY 368, at pp. 375-380 (1915); and People v. Cassidy, 213 NY 388 (1915).

Justice Roberts, in People v. Burke, supra, at p.308, described the

history and intent of these statutes, referring to People v. Willett, 213 NY 368, at pp. 376-377:

> "Prior to 1892 much has been said and written about the power wielded by political leaders, or so-called 'bosses' in the state and in the subdivisions thereof. In the second edition of 'The American Commonwealth,' by James Bryce, which was issued in 1891, in discussing American politics and the power of individuals to control party nominations, he says, 'There is usually some one person who holds more strings in his hand than do the others. Like them, he has worked himself up to power from small beginnings gradually extending the range of his influence over the mass of workers and knitting close bonds with influential men, outside as well as inside politics, perhaps with great financers or railway magnates who he can oblige and who can furnish him with funds... * * * * He dispenses places, rewards the loyal, punishes the mutinous, concocts schemes, negotiates treaties * * * Another useful expedient has been borrowed from European monarchies in the sale of nominations and occasionally of offices themselves. A person who seeks to be nominated as a candidate for one of the more important offices such as a judgeship or a seat in the State Senate in Congress, is often required to contribute to the election fund a sum proportioned to the importance of the place he seeks, the excuse given for the practice, being the cost of elections; and the same principle is occasionally applied to the gift of non-elective offices, the right of appointing to which is vested in some official member of a Ring - e.g., a mayor'"

The instant illegal cross-endorsements contract, assuring the uncontested nomination and election of judges in the Ninth Judicial District over a three-year period by passage of identical resolutions of nomination at both the Republican and Democratic Judicial Nominating Conventions, is nothing but yet another attempt by political bosses to corruptly bargain, barter and trade in important offices - a practice our State Legislature, through its statutes and Constitutional Conventions, has condemned for nearly a century and a half.

This Court should note that the instant case is distinguishable from People v. Cunningham, 88 Misc 2d 1065 (Sup. Ct., Bronx Co. - 1976), an unappealed lower court decision involving a criminal proceeding in Bronx County. That matter involved a criminal indictment charging that Patrick Cunningham, then a Bronx County Democratic leader, tendered a

judicial nomination to then City Councilman, Anthony Mercorella, in return for Mercorella's promise to resign his position at a time when it would result in a political benefit to the regular Democratic organization. Acknowledging that the legal and factual issues were "close ones", the Bronx County Supreme Court Judge dismissed felony indictments against these two Bronx political officials by narrowly construing the language of the penal provisions of former §448 of the Election Law (subpara. 3), "Payment or contribution of any valuable consideration, or upon an understanding or promise thereof," to exclude from its meaning the conferring of a political benefit to a political party, as opposed to a "material benefit" to an individual or entity. The reasoning of the Court in Cunningham in support of such construction is unpersuasive, but the facts in that case differ in important respects from the instant civil proceeding where there are material benefits on all three sides, gained by all the respondents.

Most importantly, Cunningham involves a criminal prosecution. The instant case is entirely civil in nature seeking only civil remedies including, among other things, to have an illegal agreement declared void. While the courts commonly apply a strict construction to statutory language in criminal cases, they liberally construe the meaning of statutory language when civil remedies alone are sought:

> "For the purposes of ascertaining their intended object, statutes for the prevention and punishment of corrupt practices should be liberally construed and rigidly enforced. So it has been held as to its remedial provisions the statute should have a liberal construction, in the light of previous experience and prior enactments, but should be strictly construed as to its penal provisions. 29 C.J.S., 814, 815, Elections §329."

New York Election Law section 16-100, paragraph 1, provides that " . . . any subject set forth in this article [Article 16] shall be construed liberally." Article 16 includes Election Law section 16-102 pursuant to which the instant civil proceeding is brought, and therefore, this Court should apply a liberal construction to all statutory language pertinent to this proceeding.

It is imperative that this Court immediately grant the relief sought in the instant civil proceeding. This illegal contract, if allowed to stand, not only deprives voters in the upcoming election of their right to participate in a meaningful election between the two major parties' judicial nominees, it also sets a dangerous precedent for future long-term engineering of corrupt bargains, barters and trades between Republican and Democratic political bosses. The subject contract, a "Three Year Plan", might another time become a "Five Year Plan", and perhaps another time a "Plan for the Decade", or a "Plan for the Century"! The effect of all such deals is to circumvent the lawful, constitutionally-guaranteed right of election of the New York Judiciary, rendering such elections a rubber stamp, a sham and a travesty.

The cross-endorsements contract is palpably illegal for yet another reason. Over and beyond the loss of independence and integrity of the judicial nominees represented by their essential consent to the terms of the contract, their independence and integrity is further compromised by a further condition to their nomination, contractually imposed by both

Republican and Democratic parties, which expressly and specifically required that each judicial nominee:

> ". . . pledge that, once nominated for the stated judicial office by both of the major political parties, he or she will [after election] . . . provide equal access and consideration, if any, to the recommendations of the leaders of each major political party in connection with the proposed judicial appointments." See bottom paragraph on page 2 of Ex. G attached to Petition.

By making such a pledge as these judicial nominees were required to make as a condition of their endorsements, they bound themselves in advance to bring politics right into their judicial chambers by dispensing their judicial appointments, whenever guardians, conservators, administrators, referees and the like are needed, wholly on the basis of party affiliation and party loyalty. We have now arrived at judicial patronage by written fiat of the party leaders, as a pre-condition to nomination, without even passing respect to the merit, or lack thereof, of the appointees, in blatant violation of the Code of Judicial Conduct and Court Rules relative thereto.

Assuredly, the confidence of the public, as well as the practising bar, is hardly enhanced by such a brazenly political arrangement. Such political arrangement not only violates the Election Law, but also violates the Rules of the Chief Administrator of the Courts, Part 100, Judicial Conduct, sections 100.1, and 100.2, recognizing that:

> " An <u>independent</u> and <u>honorable</u> judiciary is <u>indispensable</u> to justice in our society. Every judge shall participate in establishing, maintaining, and enforcing, and shall himself or herself observe, high standanrds of conduct so that <u>independence and integrity</u> of the judiciary may be preserved . . .", section 100.1, (underscoring ours for emphasis);

and requiring that:

> " (a) A judge shall respect and comply with the law and shall conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> (b) No judge shall allow his or her family, social or other relationship to influence his or her judicial conduct or judgment.
>
> " (c) No judge shall lend the prestige of his or her office to advance the private interests of others nor shall any judge convey or permit others to convey the impression that they are in a special position to influence him or her. . .", section 100.2, (underscoring ours for emphasis).

The court rules on judicial conduct further mandate that " . . . A judge shall exercise the power of appointment only on the basis of merit, avoiding favoritism . . .", Rules of the Chief Administrator of the Courts, Part 100, Judicial Conduct, section 100.3(b)(4), (underscoring ours for emphasis).

POINT II

THE LOWER COURT ERRONEOUSLY HELD AS A MATTER OF LAW THAT THE PETITION FAILS TO STATE A CAUSE OF ACTION

The Petition alleges that said Certificates of Nomination were the end product of an illegal cross-endorsement agreement entered into by the leaders of the Westchester Republican and Democratic County Committees and the judicial candidates involved in the 1989 race for the Supreme Court vacancies in the Ninth Judicial District. That agreement was embodied and memorialized in written resolutions thereafter adopted by the Westchester Republican Executive Committee and the Westchester Democratic Executive Committee, more particularly described in the Statement of Facts hereinabove. The Petition alleges that in furtherance of said agreement, Respondents Nicolai and Miller, also accepting the terms and conditions thereof, became the 1990 judicial nominees for the Ninth Judicial District, and that Respondent Emanuelli became the cross-endorsed candidate for Surrogate.

The Court below ruled, erroneously, that the practice of cross-endorsement of judicial candidates is not presently prohibited by the Election Law. Petitioners contend that although cross-endorsement of judicial candidates in the abstract is not a specifically prohibited practice under the Election Law, the particular cross-endorsement agreement in question, representing a conditional exchange of valuable consideration, is within the proscription of corrupt practices outlawed by the penal provisions of the Election Law Sec. 17-158 and therefore clearly against public policy.

The Lower Court barred any attack on the legality of the agreement on the erroneous premise that there was "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." (at p.4) Such incredible finding totally flies in the face of the pleaded allegations in the Petition, detailed more particularly in the Objections and Specifications annexed thereto, sworn to by Petitioners, as well as in supporting Affidavits. Petitioners specifically set forth that the Judicial Nominating Conventions of both parties did not conform to the procedural safeguards and mandates of the Election Law, Sec. 6-124 and 6-126. Indeed, among other fatal defects at the 1989 and 1990 Democratic Judicial Nominating Convention there was no Roll Call to ascertain the existence of a quorum, no quorum in fact and no vote by a majority thereof. Likewise as to the Republican Judicial Nominating Convention, Petitioners alleged that Respondent Colavita violated the Election Law safeguard, legislatively designed to avoid coercion on the assembled delegates, requiring that the Convenor have no other function once the Convention is organized, by also acting as its Permanent Chairman.

Accepting as true, as it must, on a motion to dismiss, all of the allegations of the Petition and inferences thereof, the Lower Court should have found the agreement illegal, as a matter of law, or at the very least, that it stated a cause of action, and given Petitioners the opportunity to present their

proofs at an evidentiary hearing.

The Lower Court apparently believed that the illegal agreement became decontaminated once it was put in a written resolution form and adopted at a judicial nominating convention, and ignored the aforementioned fatal procedural deficiencies of the Conventions.

Justice Kahn erroneously held that as long as there is a properly convened convention, following mandated procedures of the Election Law, any agreement adopted at the Convention is unassailable, even if it violates the New York State Constitution, the Election Law, the Rules of Judicial Conduct, and this State's public policy.

As shown herein, the gravamen of the Petition was that mandated procedures of the Election Law were <u>not</u> followed. Therefore, by the Court's own reasoning, Petitioners were entitled to the relief requested.

POINT II

THE PETITIONERS HAVE STANDING TO BRING THE INSTANT PROCEEDING.

Petitioner Castracan is a registered voter enrolled in the Republican Party, qualified to vote in the upcoming general election of Judges for the Ninth Judicial District. Petitioner Bonelli is a registered voter enrolled in the Democratic Party, also qualified to vote in the upcoming general election of Judges for the Ninth Judicial District. As such, petitioners herein are persons aggrieved under the Election Law, who have standing to bring the petition in the instant special proceeding pursuant to §16-102 of the New York Election Law, Spillane v. Katz, 32 AD2d 157 (1st Dept. - 1969), rev. on other grounds, 25 NY2d 34 (1969); Matter of Decatur v. Board of Elections of Albany Co., 47 Misc 2d 647 (Sup. Ct. Albany Co. - 1965), aff'd 24 AD2d 735 (3rd Dept. - 1965), aff'd 16 NY2d 848 (1965); Mahoney v. Lawley, 301 NY 425, 427 (1950).

Petitioners herein also have standing under general contract law to have the cross-endorsements contract declared illegal. Although generally only parties to a contract can have it declared illegal, third persons can assert rights based on the contract, "...where the public interests or the interests of the persons asserting the invalidity [of the contract] are affected." 17 C.J.S. 1215, 1216, Contracts §283.

Clearly, in the instant case, the petitioners, as registered voters of the Republican and Democratic parties in the Judicial District at issue, are persons whose interests are affected by this illegal cross-endorsements contract. They, and the other registered voters and electors in the Ninth Judicial District, have, in effect, been disenfranchised of their right of "election". They are third-party victims, rather than beneficiaries, of this illegal contract, their

interests are affected by it, and, accordingly, they have standing to seek relief from this Court, River Garden Farms, Inc. v. Superior Court for County of Yolo, 103 Cal. Rptr., 498, at p.508 (Court of Appeals, 3d District - 1972), citing Johnston v. Johnson, 127 Cal. App. 2D 464, 472; 17 C.J.S. Contracts §283; 14 Williston on Contracts (3d Ed 1972) 31. This Court should also note Committee of One Thousand to Re-elect State Senator Walt Brown v. Eivers, 674, P.2d, 1159, 296 Or. 195, which held that the standing requirements under the Oregon Corrupt Practices Act should be construed liberally, because the proceedings involved a civil remedy, which replaced a former criminal sanction. As stated in this Oregon decision, such plaintiffs function much like private attorneys general, as their suits effectuate the underlying purpose of the act to secure and protect the purity of the ballot and emocratic process.

Likewise, the civil nature and remedies in the instant proceeding compel a similar liberal interpretation of the standing requirements. The public interest affected by this illegal cross-endorsement contract is another basis for determining that third-parties such as the petitioners herein have standing, 17 C.J.S. Contracts §283, pp.1215 & 1216; Lewis et al v. Jackson and Squire, 86 F. Supp. 354, at 360. Certainly, the petitioners herein, the third-party victims whose interests are affected by this illegal contract, which also heavily impacts on the public interests, should be given the same recourse to the courts as the "donee beneficiaries" in Lewis v. Jackson and Squire, supra.

POINT IV

PETITIONERS HAVE JOINED ALL NECESSARY PARTIES

The necessary joinder of parties is governed by Section 1001 of the C.P.L.R. First, as Joseph M. McLaughlin states in the Supplementary Practice Commentaries in 1989 regarding this statute:

> " In deciding who are necessary parties without whom the action should not continue, the courts continue to ask two questions: (1) Will those who are already parties to the lawsuit be given "complete relief" if the missing party is not joined? and (2) If the missing party is not brought in the action, will he be inequitably affected? . . ."

In the instant proceeding, the answer to question (1) above is "Yes", and the the answer to question (2) above is "No". Thus, all necessary parties have already been named and joined in the instant proceeding.

All the candidates whose nominations are under attack in this proceeding have been named as respondents. Any candidate whose nomination is not under attack is not a necessary party, Jones v. Gallo, 37 AD2d 793 (4th Dept.- 1971).

A committee is not a necessary party in the instant proceeding seeking to invalidate the nominations of the respondent judicial nominees, Berman v. Board of Elections of Nassau County, 68 NY2d 761 (1986).

Secondly, it is clear from C.P.L.R. section 1001 and New York case law interpreting it, that assuming a court determines that an unnamed person or entity is a necessary party, granting the drastic relief of dismissal of the action or proceeding is improper and constitutes reversible error, Airco Alloys Division, Airco Inc. v. Niagra Mohawk Power Corp., 65 AD2d 378 (1978); State v. Schenectady Chemicals, Inc., 103 AD2d 33 (1984). See also Pilat v. Sachs, 59 AD2d 515 (1st Dept.- 1977), aff'd 42 NY2d 984); and Berman, supra.

POINT V

THE RESPONDENT JUDICIAL NOMINEES, AS INTEGRAL PARTIES TO THIS ILLEGAL CONTRACT, SHOULD BE DISQUALIFIED AS JUDICIAL CANDIDATES IN THE UPCOMING ELECTION.

The evidence will show that the respondent judicial nominees participated, directly and indirectly, in the making of this illegal cross-endorsements contract. As such, they should be disqualified from the judicial offices to which they have been nominated in the upcoming election since:

> "The penalty ordinarily imposed on a candidate for violation of corrupt practices statutes is disqualification for office..." 26 AM JUR2d Elections §380, p.191.

A respondent judicial nominee "...may be deemed to be a participant in the unlawful purpose [of the illegal contract] if, with knowledge thereof, he does anything which facilitates the carrying out of such purpose." 21 NY JUR2d, Contracts §140, p.546.

In the instant case, the respondent judicial nominees, at the very least, facilitated the carrying out of the unlawful purpose of the illegal cross-endorsements contract, not only by accepting the nominations, but also by pledging that once elected, they would divy up the judicial appointments based on the recommendation of the leaders of the two major political parties. As such, they participated in the unlawful purpose of the contract. Accordingly, they should be disqualified from office in the upcoming judicial elections.

POINT VI

LACHES IS NOT A DEFENSE TO THE INSTANT PETITION

Petitioners herein bring the instant proceeding pursuant to Section 16-102 of the New York Election Law, a statutory proceeding, which is legal, not equitable, in nature. Accordingly, the defense of laches does not apply in this proceeding:

> "...The doctrine [of laches] applies to suits in equity. It does not bar actions at law commenced with the period fixed by the statute of limitations." A.L. Sainer, THE SUBSTANTIVE LAW OF NEW YORK, Vol. 2, Sec. 11-12, entitled, "Laches and the Statute of Limitations", p. 594.

This same principle was also enunciated in 75 NY JUR 2d at p. 546:

> "Laches is a doctrine peculiarly applicable to suits in equity; it does not operate to bar actions at law. Thus, laches is no defense to an action at law commenced within the period fixed by the statute of limitations...Moreover, laches is no defense to an equitable action where the statutes of limitations pertaining to the actions of law are applicable because the remedy is concurrent at law and in equity. Thus, an action for an equitable remedy in aid of or to enforce a legal right is not barred by inaction until the legal remedy is barred by the statute of limitations.", 75 NY JUR. 2d 546, 547 "Limitations and Laches" Sec. 339.

Election Law Sec. 16-102 contains its own statute of limitations. This statute of limitations, further showing that this proceeding is one <u>at law</u>, has been fully complied with, as applied to the instant respondents. No objection as to timeliness was ever raised by Respondent New York State Board of Elections.

The <u>remedies</u> sought in this proceeding are clearly not equitable. The relief sought in this Order to Show Cause was to

have the cross-endorsement contract (1) declared illegal and void as violative of the New York State Constitution, New York statutory law, and the public policy of this State; (2) to have vacated the nominations of the respondent nominees pursuant to New York Election Law Sec. 16-102 for all the reasons stated in Point I herein; (3) to obtain an Order requiring the reconvening of the judicial conventions of the respondent party committees, pursuant to Election Law, Sec. 16-102; (4) to have the respondent nominees declared disqualified and barred from being designated as candidates for the respective public offices, pursuant to New York Election Law Section 16-102.

Even in equitable actions, which this is not, Respondents have the burden of establishing all four elements of the defense of laches. These four elements are set forth in 75 NY JUR 2d, p. 538, "Limitations and Laches", Sec. 333:

> "A suit is barred on the ground of laches or stale demand where the following facts are disclosed: (1) conduct on the part of the defendant, or of one under whom he claims, giving rise to the situation of which complaint is made and for which the complainant seeks a remedy; (2) delay in asserting the complainant's rights, the complainant having had knowledge or notice of the defendant's conduct and having been afforded an opportunity to institute a suit; (3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit; (4) injury or prejudice to the defendant in the event that relief is accorded to the complainant or that the suit is not barred."

In the instant proceeding, Respondents have not alleged facts establishing those essential four elements of laches.

Moreover, the Petition asserts a transcendant public interest in invalidating judicial nominations arising out of an

illegal political contract, which violates the New York State Constitution, New York State Election Law, Sec. 17-158, the Code of Judicial Conduct and Court Rules relative thereto, and New York State public policy (see Point I herein):

> "...as a general proposition the doctrine of estoppel by conduct or by laches has no application to an agreement or instrument which is illegal because it violates an express mandate of the law or the dictates of public policy." 17 AM JUR 2d, p.613, 614, Contracts, Sec. 232.

See also, Higgins, Boston University Law Review, "The Application of the Doctrine of Laches in Public Interest Litigation", Boston University Law Review, vol. 56,pp.181-208, citing Steubing v. Brinegar, 511 F.2d 489 (2nd Cir. 1975); and Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323 (4th Cir.) cert. den., 409 U.S. 1000 (1972). As demonstrated in this well reasoned and carefully-researched law review article, a private plaintiff's claim, which furthers important public interests, should be immune from any laches defense. Even where a private plaintiff's claim is barred by a statute of limitations, it has been held that the statute of limitations will not be sustained, where a private plaintiff seeks to protect important public interests, Boston University Law Review, supra., at p. 190, citing Perley v. Heath, 201 Iowa 1163, 208 NW 721 (1926).

CONCLUSION

For all the reasons hereinabove stated, this Court should reverse the Order of the Lower Court, and immediately render an Order granting Petitioners the following additional relief:

1. Declaring that the subject cross-endorsements contract embodying the "Three Year Plan", described hereinabove, is illegal, invalid, void and against public policy;

2. Declaring that the all actions taken in the performance and implementation of the aforesaid Contract are illegal, invalid, void, and against public policy, and that the Republican and Democratic Certificates of Nomination, purporting to nominate said Respondents MILLER and NICOLAI and the Petition purporting to designate Respondent EMANUELLI for Surrogate of Westchester County, as well as the purported designation, be vacated, annulled and set aside;

3. Directing that Respondents WESTCHESTER REPUBLICAN COUNTY COMMITTEE and WESTCHESTER DEMOCRATIC COUNTY COMMITTEE reconvene their Judicial Conventions;

4. Declaring that Respondents NICOLAI and MILLER, as parties to the aforesaid Contract, be disqualified and barred from nomination as candidates to fill such judicial offices, and that Respondent EMANUELLI as a party to such Contract be likewise disqualified and barred from designation as a candidate for Surrogate of Westchester County;

5. Directing that said reconvened Judicial Conventions proceed to the nominations of candidates for said judicial

offices in strict compliance with the mandatory requirements of the Election Law, most specifically Sections 6-124 and 6-126; and

6. Enjoining, restraining, and prohibiting Respondents NEW YORK STATE BOARD OF ELECTIONS and WESTCHESTER COUNTY BOARD OF ELECTIONS from printing and placing the names of the said Respondent candidates for election to the Supreme Court and Surrogate's Court of Westchester County on the ballots to be used at such General Election to be held on November 6, 1990.

Dated: White Plains, N.Y.
October 16, 1990

Respectfully Submitted,

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