SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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

Index No. 6056/90

Petitioners,

AFFIRMATION IN OPPOSITION

-against-

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

Assigned to: Justice Kahn

-vs-

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

Respondents,

for an Order declaring invalid the Certificates purporting to designate Respondents Hon. FRANCIS A. NICOLAI and HOWARD MILLER, Esq. as candidates for the office of Justice of the Supreme Court of the State of New York, Ninth Judicial District, and the Petitions purporting to designate ALBERT J. EMANUELLI, Esq. a candidate for the office of Surrogate of Westchester County to be held in the general election of November 6, 1990.

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

I, JAY B. HASHMALL, an attorney duly admitted to

practice law before the Courts of the State of New York, do, under penalties of perjury, hereby affirm to be true as follows:

1. I am a member of the firm of HASHMALL, SHEER, BANK & GEIST, attorneys of record for the Respondents, DENNIS MEHIEL, Chairman, WESTCHESTER COUNTY DEMOCRATIC COMMITTEE and RICHARD K. WEINGARTEN. As such I am fully familiar with the facts and circumstances recited below and I execute this affirmation in opposition to the Order to Show Cause and Verified Petition in this Election matter.

2. This is an election case seeking to invalidate Certificates of Nomination of two out of three Democratic candidates nominated by the 9th Judicial District Convention to run in the general election on November 6,1990 for the public office of Supreme Court. The Petitioners have termed the cross-endorsement of these candidates as a "contract" pursuant to a "three (3) year plan" of the Respondent Party Leaders in the Democratic and Republic Party Leaders.

3. In conjunction with this relief, the Petitioners in conclusory fashion also seek to invalidate and object to the conduct of the 9th Judicial District Conventions of both major parties without specifying any particular defects and without having served or filed any general or specific objections at least to the Democratic Certificates of Nomination. Petitioners claim that the cross-endorsement of these candidates violates Article 6 Section 6(c) of the State Constitution in that by reason of these cross-endorsements the "electors" of the 9th Judicial District have been disenfranchised.

4. As the Verified Answer of the Respondents demonstrates, the Petitioners' proceeding has numerous defects and fatal flaws which should first be addressed by this Court. It is unclear as to the reason why the Petitioners failed to commence this proceeding in 1989 at the time when the RESOLUTION providing for cross-endorsements was adopted, or, at the very least at the time of the nominations of the 1989 Supreme Court Justice cross-endorsed candidates, FREDMAN, JIUDICE and EMANUELLI*. Further, it is unclear as to why all of the candidates and justices have not been joined in this proceeding nor why the committees to fill vacancies on the certificates of nomination have not been joined nor even the Chairman of each political parties' 9th Judicial District Convention in accordance with the Election Law of the State of New York.

5. Lastly, it is certainly unclear as to what standing each petitioner has to bring and commence this proceeding. Although each alleges to be a member of the Democratic and Republican Party respectively, neither claim to or in fact were elected Delegates or Alternates to any 9th Judicial District Convention, the Certificates of which have been challenged in this proceeding. Nor is it claimed that either petitioner was a candidate to be a Delegate or Alternate to said nominating

*It is noted that Petitioners' spokesperson, Eli Vigliano, and their lawyer (who are the only true conspirators) are quoted in the newspapers (New York Times, October 1, 1989) over one year ago as threatening to bring this action.

judicial convention.

6. On its merits, it is respectfully submitted that the Petition fails to state a cause of action or claim. The mere fact that two candidates for Supreme Court Justice were cross-endorsed by the Democratic, Republican and Conservative Parties even pursuant to a resolution of the Executive Committees of each party is neither illegal or unethical. In fact some commentators and newspaper editorials have praised these acts. The fact remains that there are three (3) vacancies for the public office of Supreme Court Justice in the 9th Judicial District to be elected this November.

7. Pursuant to Election Law 6-106, Sections 6-124 and 6-126, the nomination of the candidates for the office of Supreme Court Justice are different from nominations for other elected public offices. Each political party makes said nominations by the convention method rather than by petition or primary. Pursuant to each party's own rules, delegates to a judicial convention are selected in a proportionate representation by Assembly District throughout the particular district which in this case is the 9th Judicial District consisting of the Counties of Westchester, Rockland, Putnam, Orange and Dutchess which convention is convened on a stated date within a defined one week period following primary day (Section 6-158(5)) and judicial candidates are then selected by nomination and vote by the delegates of each convention to run on the November ballot.

8. The judicial delegates to each political party's judicial convention are elected as Delegates or Alternates

pursuant to the normal election law process through the filing of designating petitions and selection at a party primary on primary day.

9. Since the Petitioners have not challenged the constitutionality of the provisions of the Election Law which authorize this process and furthermore, since neither petitioner alleges to have participated in said process by running for or being elected or appointed a Delegate to any such judicial convention, they lack necessary standing in which to challenge either the conduct of any convention nor the nominations made pursuant thereto.

10. Further, there was absolutely nothing which prevented Petitioners, their attorneys, or any other person from filing designating petitions to run as a candidates for Surrogate's Court or Family Court in Westchester County. Any enrolled voter could have run in a primary in any political party or run as an independent for these judicial offices. Voters were not dienfranchised.

11. The bottom line is that on this November's ballot, the electors of the 9th Judicial District can select and vote for three (3) Supreme Court Justices candidates. There have been four (4) candidates nominated for said three (3) positions by the Democratic, Republican and Conservative parties. I do not know whether the Liberal Party or the Right to Life Party have nominated candidates but pursuant to the State Election Law they could have so nominated and there may be additional candidates on

the November ballot. In either case, the electors have not been disenfranchised as claimed by Petitioners as only three candidates can be elected on November 6, 1990 and there are at least four (4) candidates nominated. By this very fact, the Petition on its face has failed to state a cause of action at least as with regard to the claim that any cross-endorsement violates the State Constitution of the State of New York and consequently should be denied.

13. This lawsuit is frivolous and this type of use of the judicial system must be stopped. Petitioners and their attorneys' remedy is at the ballot box and not in the courthouse. To couch this proceeding in terms of "pro bono publico" and as a constitutional violation is an insult. If this proceeding had been timely commenced last year by parties with standing, who had joined all of the necessary parties and followed and exhausted all of the administrative remedies - that would be one thing. But to bring this type of election challenge over a year late with all of these defects and requiring so many public and party officials from Westchester County to travel to Albany and retain five, six or seven sets of attorneys - is clearly an abuse of the legal system. We respectfully request that appropriate sanctions and counsel fees be assessed in order to curb repetition of this careless, frivolous and abusive conduct.

WHEREFORE, Respondents pray for a judgment and order denying this proceeding in its entirety and awarding the Respondent costs and disbursements of this action together with

reasonable attorneys fees in the sum of FIVE THOUSAND and 00/100 ($5,000.00) DOLLARS, and for such other and further relief as to this Court may deem just, fair and equitable.

Dated: White Plains, New York
October 11, 1990

JAY B. HASHMALL