G-15

COURT OF APPEALS
STATE OF NEW YORK

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

Affirmation in Opposition

Petitioners-Appellants,

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

Third Dept. Appeal No. 62134

-vs-

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

Respondents-Respondents,

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ELI VIGLIANO, an attorney duly licensed to practice law in the Courts of the State of New York affirms the following to be true under penalty of perjury:

1. As Mr. Ciampoli acknowledges, I am fully familiar with all the facts and circumstances of this case, having been involved therewith from its inception. All of my statements herein are based on direct personal knowledge, unless otherwise indicated.

2. This Affirmation is submitted in opposition to Mr.

Ciampoli's August 2, 1991 Affirmation on behalf of the New York State Board of Elections in support of his motion returnable September 9, 1991 to strike the within "appeal as of right", to deny Appellants permission to appeal, and for sanctions against Petitioners-Appellants, myself as Appellants' pro bono counsel, and against Doris L. Sassower, who handled the matter as Appellants' pro bono counsel in the lower courts, until my substitution for her firm as attorney of record in connection with this appeal.

3. At the outset, it should be noted that Mr. Ciampoli does not accompany his Affirmation with any Memorandum of Law, indicative that his motion is legally unfounded. Nor do any of the other counsel who "join in and adopt" Mr. Ciampoli's motion submit any legal Memorandum addressed to this Court[1].

4. The only other papers received from Respondents relative to the instant motion are an Affidavit from Mr. Dranoff supporting Mr. Ciampoli's motion on behalf of Respondent Miller and two letters supporting it, one from Mr. Malone, on behalf of Respondent Emanuelli, in which he "join(s) in and adopt(s) the motion, arguments and supporting papers of Co-Respondent Board of Elections for an order dismissing the Notice of Appeal" because "the grounds for the appeal are patently frivolous", and one from

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[1] Mr. Dranoff annexes to his Affirmation a copy of his December 14, 1990 Brief submitted to the Third Department. That Brief was extensively rebutted in Appellants' Reply Brief, dated January 24, 1991, particularly at pages 14-26, part of the Record already before the Court, to which Appellants respectfully refer the Court.

Mr. Abinanti on behalf of Respondent Nicolai, in which he likewise "joins in and adopts the arguments" of Mr. Ciampoli. No other Respondents have served any papers opposing this appeal or in support of the demand for sanctions.

5. Since Appellants have not requested permission from this Court to appeal, there is no basis for that branch of Mr. Ciampoli's motion as requests such relief. There is, likewise, no legal basis for his requesting Rule 130-1.1 sanctions. As counsel apparently knows--since they do not cite the full title as it usually appears--the sanction rule is Part 130 of the Uniform Rules of the Trial Courts, which does not purport to be applicable to appellate courts, nor does it purport to be applicable to former counsel, such as Doris L. Sassower. Hence, that branch of the motion seeking sanctions is, likewise, improper.

6. If such sanction rule were applicable to motions in the Court of Appeals, it would thus be warranted against Mr. Ciampoli, and those Respondents' counsel who have "adopted and ratified" his sanctions application. Part 130-1.1 expressly authorizes sanctions for making an unfounded sanction motion--plainly the case here.

7. I have also received from Mr. Ciampoli a copy of his letter to the Court, dated August 27, 1991, wherein he suggests adjournment of his instant motion to a later date to permit a decision by the Appellate Division on motions pending before it, since "the resolution of issues below might be

dispositive of the entire matter". No objection to Mr. Ciampoli's suggested adjournment has been received from any other Respondent.

8. Appellants believe that this Court's acceptance of the appeal "as of right" would also be "dispositive of the entire matter". However, they take no position as to such adjournment suggested by Mr. Ciampoli in light of the intervening circumstances since he made his instant motion, which might warrant deferment until the decision of the Appellate Division, Third Department on the reargument/renewal motion pending before it, including, specifically, also a motion for permission to appeal to this Court.

9. It is respectfully submitted that this Court's Order dated August 28, 1991, dismissing the appeal in the related case of Sady v. Murphy, which raised some, but not all, of the critical issues in Castracan, raises a cloud over the Third Department's Decision in People v. Hochberg, 62 AD2d 239 (3rd Dept. 1978, per Mikoll J.). The Appellate Division, Third Department may now wish to grant leave to appeal the Castracan case to the Court of Appeals. This Court's Order in Sady let stand the lower court decision of Westchester County Supreme Court Justice Vincent Gurahian (Exhibit "A"), who ruled that the Three-Year Deal involved in both cases was not unconstitutional or illegal. In addition, he held that Section 17-158 of the Election Law requires that the proscribed "valuable consideration" be a monetary one. The latter aspect of Justice

Gurahian's Decision creates a dichotomy between the Second and Third Departments which in People v. Hochberg, supra, ruled that the prohibited "valuable consideration" could be a non-monetary one. By the Hochberg standard, the promises of the leaders of the two major parties and their judicial nominees in this case to support each others' judicial candidates in a seven-judge cross-bartering deal constitutes "valuable consideration", proscribed under Section 17-158 of the Election Law. Such determination would result in a finding in the Third Department, contrary to that of Justice Gurahian in the Sady case. To avoid uncertainty and inconsistency of results, the Appellate Division, Third Department may well grant Appellants' leave application in the interests of justice and in order that the compelling public interests at stake receive appropriate review by this Court and a decisive adjudication on the merits.

10. Additionally, it is respectfully submitted that the failure of Justice Gurahian in Sady and Justice Kahn in Castracan to grant Appellants their right to an evidentiary hearing constituted a violation of their due process rights. Consequently, the decision of the Appellate Division, Second Department, affirming on the stated basis of Appellants' failure of "proof", just like Justice Kahn's similar erroneous finding cannot stand as a matter of law, without constituting denial of due process, since no opportunity to present evidentiary proof at a hearing was afforded.

11. The due process issue is another recognized basis

for an "appeal of right". The Appellate Division, Third Department's own failure to give Appellants an opportunity to settle the record is also a due process issue raised by Appellants' pending motion before it. In that connection, it should be noted that notwithstanding that a substantial constitutional question must be directly involved to sustain an "appeal of right", it is settled law that even when a substantial constitutional question is not directly involved:

> "...where the decisive question is whether a judgment is the result of due process, an appeal lies to the Court of Appeals as a matter of right, even though in determining that question the court must give consideration to the proper construction and effect of a statute" 11 Carmody-Wait 71.25, citing Valz v. Sheepshead Bay Bungalow Corp., 249 NY 122, cert. den. 278 U.S. 647.

12. **Relative to Mr. Ciampoli's claim for sanctions** based on Appellants having filed their Notice of Appeal and allegedly engaging in simultaneous motion practice before the Appellate Division, it should be emphasized that because this is an Election Law proceeding, Appellants sought in good faith the most expeditious judicial review available. The first Notice of Appeal "as of right" from the affirmance of the dismissal order by the Appellate Division, Third Department was filed with this Court by the then attorney of record, Doris L. Sassower, P.C..

13. The appeal "as of right" is based upon the direct involvement of constitutional questions. To establish such jurisdiction, in response to the Court's sua sponte inquiry dated July 16, 1991, Appellants submitted to this Court an Appendix

extracting references to the constitutional issues raised by Appellants' papers in the Lower Court. Accompanying the Appendix was a Memorandum, dated August 1, 1991, demonstrating that the proposed appeal involves questions that are novel, of public importance, and which require interpretation of prior decisions of the Court of Appeals and of the Appellate Division.

14. Appellants rest on these two documents to rebut Mr. Ciampoli's claim of any sanctionable misconduct on Appellants' part that would meet the rigorous requirements of the sanction rule. The serious and substantial nature of Appellants' prior submissions to this Court should suffice to demonstrate that I was acting in complete good faith.

15. Contrary to the attempt by Mr. Ciampoli and Mr. Dranoff to minimize the importance of this case and to pervert the truly substantial and far-reaching issues it raises, Appellants are not seeking "a statute prohibiting cross-endorsements" or "requiring a political party to nominate a separate candidate". What is involved in this case is a particular political agreement implemented by deliberate and corrupt misuse of the permissible multi-endorsement mechanism. It is that agreement which Appellants submit should be declared a nullity because it is violative of the Election Law, the state and federal constitutions, violative of ethical mandates of the Code of Judicial Conduct and the Rules of the Chief Administrator of the Courts, and therefore illegal, unethical and against public policy. All that is necessary is for the courts to

recognize it as such. That is the function of the Courts, not the Legislature. This Court put it well in Rosenthal v. Harwood, 35 N.Y.2d 469:

> "It is one thing for the law to leave to one the option whether to behave morally or ethically; it is quite another for our court to close its eyes to the exertion of pressure by a public or quasi-public body, such as a political organization subject to and operating within the framework of the Election Law, to do an unethical act. Such inaction would be tantamount to the law's lending its sanction to a practice in violation of public policy (cf. Shelley v. Kraemer, 334 U.S.1, 68 S.Ct. 836, 92 LL. Ed. 1161).

16. Appellants do not contend, as Mr. Dranoff misrepresents, that a judicial candidate is barred from freely accepting the endorsement of another party in which he is not registered, but only that he cannot be required to accept it as the price of getting his party's nomination. What the Court of Appeals said in Rosenthal v. Harwood, 35 N.Y. 2d 469 needs to be clarified and extended to make this clear. Appellants are not seeking legislation, but rather a dispositive judicial declaration, as in Harwood, that this time the party bosses went too far--the Resolution reflecting the Three-Year Deal, like the party by-law struck down in Harwood, must likewise be stricken down as the illegal, unethical agreement that it is.

17. While awaiting this Court's ruling on its sua sponte jurisdictional inquiry dated July 16, 1991, in order to protect Appellants' rights in the context of the exception to Section 5514 (a), a motion for reargument, renewal, recusal, or,

alternatively, for permission to appeal to this Court, and was thereafter filed in the Third Department and is sub judice.

18. As noted in footnote #5 of Appellants' August 1, 1991 Memorandum to this Court, I made it clear that Appellants' would withdraw their said motion before the Appellate Division, if, prior to disposition thereof, the Court of Appeals accepted this appeal "as of right". Mr. Ciampoli's motion to dismiss in the Court of Appeals is virtually identical to that which he has made to the Appellate Division, Third Department, in opposition to my aforesaid motion, which motion he made, likewise, without any Memorandum of Law.

19. Mr. Ciampoli's Affidavit, without citing a single case to sustain any branch of his motion, includes self-serving, factually false and legally irrelevant statements concerning me.

20. Contrary to his assertions in paragraph "10" thereof, Mr. Ciampoli is well aware that: (a) I did not previously file a criminal complaint with Respondent New York State Board of Elections[2]; and (b) The summary dismissal by the Board of Elections referred to by Mr. Ciampoli was without any investigation by that agency, without any hearing afforded to the complainant, or actual notice to him of the dismissal. My offer to furnish affidavits and an audio-cassette recording to establish the violations beyond doubt was not accepted by the

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[2] Even were that the case--which it is not, Mr. Ciampoli fails to state how that would prejudice the parties to this proceeding, who were not privy to same, nor does he so claim.

Board--contrary to its statutory duty.

21. It cannot be emphasized too strongly that Mr. Ciampoli represents a state agency charged with the duty of protecting the public interest by safeguarding the sanctity of the franchise. Rather than blocking appellate review and obstructing an adjudication on the merits of the legality and constitutionality of the Three-Year Deal, Mr. Ciampoli should be joining in Appellants' efforts to that end. This is equally true of the other Respondents--all lawyers who are officers of the Court and public officials who enjoy a public trust. It is unconscionable for Respondents--including sitting judges--to attempt to "duck" a decision on the merits--all the while that they simultaneously proclaim to the voting public the supposed virtues of the seven judge cross-bartering contract that deprived them of a meaningful vote.

22. Appellants' submissions to this Court address the serious injury to the public interest and our Court system caused, inter alia, by Respondents, including the State Board of Elections, by the misconduct alleged in the underlying Petition. Mr. Ciampoli's complete silence as to the impact and importance of these issues on the public must be deemed an admission of the truth of the facts alleged.

23. Mr. Ciampoli makes numerous serious misstatements of material fact, for which he has no foundation whatsoever. In paragraph 5 of his Affirmation, he states that a Notice of Appeal:

> "was issued over the signature of Doris Sassower after the Appellate Division, Second Department had issued an order suspending Ms. Sassower from the practice of law...".

The Notice of Appeal annexed to his papers clearly shows that (a) there is no "signature of Doris Sassower"; and that (b) the attorney of record identified therein was not Doris L. Sassower, but Doris L. Sassower, P.C., a professional corporation not suspended by the suspension order.

24. In paragraph 6, Mr. Ciampoli states, again falsely, that a second Notice of Appeal:

> "was issued over the signature of Eli Vigliano, Esq. after several of the attorneys for the various respondents notified the Court of Appeals of the facts detailed in paragraph '8' hereinabove."

The copy of the Notice of Appeal, annexed to Mr. Ciampoli's own papers clearly shows no "signature of Eli Vigliano".

25. As Mr. Ciampoli knows, I wrote to the Clerk of the Court of Appeals, dated July 5, 1991 (Exhibit "B" hereto) relative to the objections raised by Respondents' counsel to the filing of the aforesaid Notice of Appeal. A copy was sent to counsel for all Respondents, including Mr. Ciampoli. That letter sets forth the fact that "Doris L. Sassower did not prepare or file the Notice of Appeal" and explains the good faith, exigent circumstances under which the first Notice of Appeal was prepared and filed.

26. Even though the Clerk of this Court did not reply to the question raised by my July 5, 1991 letter, Ms. Sassower immediately consented to a substitution to obviate any delay of

the desired appeal resulting from said objections. Neither Mr. Ciampoli nor the other objecting counsel for Respondents ever furnished the slightest legal authority for their contention that the Notice of Appeal was "'a nullity' by reason of the suspension of Doris L. Sassower". Even at this date, there has been no ruling or communication from the Clerk of this Court sustaining the validity of Respondents' aforesaid objection to the first Notice of Appeal.

27. From the facts set forth hereinabove, it should be manifest that any violation resulting from the filing of the Notice of Appeal dated June 20, 1991, a day after service upon Ms. Sassower of the order suspending her, was unintentional, minor, and inconsequential.

28. Mr. Ciampoli's gratuitous inclusion as an exhibit of a copy of the completely irrelevant suspension order, as published in the New York Law Journal, has no legitimate purpose. The fact of Ms. Sassower's suspension was <u>not</u> in dispute, and had already been the subject of correspondence with the Clerk of the Court, copies of which all opposing counsel received. I therefore respectfully submit that said exhibit and reference thereto by Mr. Ciampoli should be stricken.

29. Mr. Ciampoli continues to make the knowingly false and undocumented statement at paragraph 7 that I "had previously filed a criminal complaint with Respondent New York State Board of Elections alleging essentially the same cause of action as criminal violations of the Election Law". The reason

he does not provide documentation for his assertion is that, as set forth in Appellants' October 28, 1990 Reply Affirmation in support of their Preference Application[3], such statement is absolutely untrue. I did not previously file any criminal complaint. I have demonstrated in prior rebuttal papers that my so-called "prior" complaint was not "a criminal complaint", was not filed with the Board of Elections, and had no connection whatsoever with the Appellants in this proceeding. The document alluded to by Mr. Ciampoli consisted of a citizen's letter addressed to Governor Cuomo, dated November 1, 1989[4], hand-delivered by me to the Governor's office that day. Without my knowledge, it was thereafter transmitted to the New York State Board of Elections. No investigation was held, nor any hearing held relative to the complaints of Election Law violations at the 1989 judicial nominating conventions. This is admitted in the

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3 Those pertinent pages (pp. 22-28), as well as the exhibits referred to therein, were subsequently annexed as #A-3 to Petitioner-Appellants' Reply Brief, dated January 24, 1991. Not included therein--but annexed as part of Appellants' October 28, 1990 submission in support of the preference application--is a confirmatory Affirmation by me stating:

> "I...adopt, approve and confirm the truth and accuracy of the facts set forth therein, and especially attest that the facts...as they relate to me are true and correct in all respects..."

4 Said letter was annexed as Exhibit "B" to Appellants' October 28, 1990 Reply Affirmation in further support of their Preference Application.

October 17, 1990 letter[5] of Peter Kosinski, Esq., Special Deputy Counsel to the New York State Board of Elections, which closed their file seven months later without even giving me actual notice thereof. Nor does Mr. Ciampoli mention the fact that in late November 1989, in a telephone conversation with Patricia Martinelli, Enforcement Counsel of the New York State Board of Elections, possibly related to Westchester's politically well-connected Martinelli family, I offered to send her affidavits and a tape recording to prove the alleged violations of the Election Law which had occurred at the September 1989 judicial nominating convention. The offer was not accepted.

30. The foregoing facts, meticulously set forth by Appellants' in their aforesaid October 28, 1990 Reply Affirmation, expressly called for the Court's intervention:

> "The...shocking behavior by a governmental enforcement body, which not only attempts to foreclose judicial investigation of Election Law abuses it failed to investigate--but seeks sanctions against Appellants' pro bono counsel for bringing the case on for judicial review, merits not only censure and sanctions by this Court under Part 130 of the Rules, but a call to the Governor for appropriate attention." (at para. 47) (emphasis in the original)

31. Appellants' January 24, 1991 Reply Brief included a separate section as to the imperative need for Court intervention resulting from Respondent New York State Board of Election's articulated policy not to investigate Election Law

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[5] Said letter was annexed as Exhibit "C" to Appellants' October 28, 1990 Reply Affirmation in further support of their Preference Application.

violations that "go behind" the face of Certificates of Nomination; and the documentary proof that even facially invalid Certificates were not invalidated by the Respondent State Board of Elections (see pp. 12-13). In pertinent part, such section[6] stated:

> "Administrative redress through the New York State Board of Elections is, thus, an illusory remedy and serves to underscore the compelling need for judicial intervention.
>
> Unquestionably, the suspect conduct of Respondent New York State Board of Elections explains its hostile position in these judicial proceedings. Clearly, it is inappropriate for such public agency to actively seek to foreclose review judicially of the Election Law abuses pleaded in the Petition herein--which it failed and refused to provide administratively. This abdication of the Board's statutory responsibility to the public is part of an on-going pattern of inaction, neglect, and misfeasance, demonstrated by its failure to address complained-of 1989 convention violations." (emphasis added)

32. In affirming Justice Kahn's dismissal of these proceedings, the Appellate Division completely disregarded the misconduct by the public agency charged with safeguarding the franchise, and condoned--without comment--that agency's partisan efforts to frustrate and foreclose judicial review.

33. It is thus not surprising--though no less shocking--that Respondent New York State Board of Elections

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6 Such section is entitled:

"The Partisan Position Taken By Respondent New York State Board of Elections Makes the Need for Judicial Review Imperative as a Matter of Public Policy"

continues its dereliction by initiating a motion to dismiss the subject appeal and to sanction Appellants, as well as their pro bono counsel, present and past, for seeking this Court's aid and intervention. Mr. Ciampoli plainly is in bad faith, seeking not only to prevent judicial review of the public interest issues, but review of the misconduct and non-feasance of his agency, as well.

34. Mr. Ciampoli expresses no concern for the transcendent public issues of this case. In sum, by any standard to be applied under Rule 130-1.1, it is Mr. Ciampoli's instant motion, joined in by various defense counsel for other respondents, that must be deemed frivolous as a matter of law. That Mr. Ciampoli, an attorney on the public payroll should seek sanctions against pro bono Appellants and their counsel, past and present, all working in the public interest must be seen as part of the intentional cover-up of the scandalous and sordid events the underlying Petition sets forth. It is Respondents' sanction motions, not this appeal, that, in the language of Rule 130-1.1 invoked by their counsel, are plainly "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another", and if said rule is deemed applicable to appellate proceedings, surely sanctionable thereunder.

WHEREFORE, it is respectfully prayed that this Court deny the motion of Respondent New York State Board of Elections and those other Respondents joining therein, for dismissal of

this appeal, denial of leave, and for sanctions, together with such other and further relief as this Court may deem just and proper, including, if sanctions are deemed allowable in proceedings before this Court under Rule 130-1.1, the imposition of sanctions against Respondent New York State Board of Elections and the other moving Respondents joining in his application.

Dated: Yonkers, New York
September 7, 1991

ELI VIGLIANO