MICHAEL A. SIRAGUSA
ERIE COUNTY ATTORNEY

COUNTY OF ERIE

MARK C. POLONCARZ
COUNTY EXECUTIVE
DEPARTMENT OF LAW

MICHELLE M. PARKER
FIRST ASSISTANT COUNTY ATTORNEY

JEREMY C. TOTH
SECOND ASSISTANT COUNTY ATTORNEY

July 29, 2013

Mr. Robert M. Graber, Clerk
Erie County Legislature
92 Franklin Street. 4th Floor
Buffalo, New York 14202

Dear Mr. Graber:

In compliance with the Resolution passed by the Erie County Legislature on June 25, 1987, regarding notification of lawsuits and claims filed against the County of Erie, enclosed please find a copy of the following:

File Name:	*Hardwick, Kevin, et al. v. Dennis E. Ward and Ralph M. Mohr, as Commissioners of and constituting the Erie County Board of Elections, et al.*
Document Received:	Order to Show Cause
Name of Claimant:	Kenneth Hardwick, et al.
Claimant's attorney:	Emilio Colaiacovo, Esq. Bouvier Partnership, LLP 350 Main Street, Suite 1400 Buffalo, New York 14202

Should you have any questions, please call.

Very truly yours,

MICHAEL A. SIRAGUSA
Erie County Attorney

By: Michelle Parker
Michelle M. Parker
First Assistant County Attorney

MMP:dld
Enclosure

ATTORNEYS
MAIN PLACE TOWER, 350 MAIN ST., SUITE 1400

At a Special Term of a Term of the Supreme Court of the State of New York held in and for the County of Erie in a courthouse located in the City of Buffalo on the 24 day of July, 2013.

RECEIVED
JUL 24 2013
ERIE COUNTY
DEPARTMENT OF LAW

PRESENT: HON. HENRY J. NOWAK J.S.C.
Justice of the Supreme Court

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

In the Matter of the Application of

FILED
ACTIONS & PROCEEDINGS
JUL 24 2013
ERIE COUNTY
CLERK'S OFFICE

KEVIN R. HARDWICK
EDWARD A. RATH
LEONARD K. PERO
JEFFREY W. GIER
CHRISTOPHER K. ARONICA
RAYMOND A. BILLICA
JAMES B. TOMKINS
JAMES MAYROSE

Petitioners

ORDER TO SHOW CAUSE

FAID
07/24/2013/ 10:51:23
ERIE COUNTY CLERK
RCPT # 13117603
I 2013002178

-vs-

Index No. I-2013-002178

DENNIS E. WARD and RALPH M. MOHR,
As Commissioners of and constituting
The ERIE COUNTY BOARD OF ELECTIONS;

NEW YORK STATE BOARD OF ELECTIONS; and

ERIE COUNTY DEMOCRATIC COMMITTEE; and

EXECUTIVE COMMITTEE OF THE ERIE COUNTY
DEMOCRATIC COMMITTEE; and

JEREMY J. ZELLNER, Chair of the Erie County
Democratic Committee and Presiding
Officer of a Purported Authorized Meeting; and

DENNIS E. WARD, Secretary of the Erie County DEMOCRATIC

Committee and Secretary of a Purported
Authorization Meeting; and

Respondents,

and,

WILLIAM C. CONRAD III,
ALAN K. GETTER,
COLLEEN M. SIENER,
DAVID M. GUNNER,
DONALD L. CLARK,
PAULETTE R. RENALDO,
JAMES P. DePASQUALE,
DAVID J. ARCARA,
PAUL J. CLARKSON,
DAWN M. SPIRES,
LYNN M. KRAJIC,
BEVERLY A. KINNEY,
SARAH E. TOLLNER,
WILLIAM M. STANLEY,
LEON E. BERNER,
JULIE L. LATHROP,
ERIK M. POLKOWSKI,
MICHAEL J. SHERY

Respondent-Candidates.

A proceeding brought pursuant to New York State Election Law §1-106, §16-102, §16-116, and §6-120 for the purpose of invalidating certain authorizations purportedly issued by the Erie County Democratic Committee and the Executive Committee of the Erie County Democratic Committee.

Upon the Verified Petition of the Petitioners, dated the 23rd day of July, 2013 and sufficient reason appearing therefore, it is hereby:

ORDERED, that the Respondents herein show cause at a Special Term, Part 25 of this Court to be held in and for the County of Erie, at 25 Delaware, Buffalo,

New York 14202 on the 14th day of August 2013 at 11:00 o'clock on the fore noon or as soon thereafter as counsel can be heard why and Order should not be granted:

1. Invalidating the purported Democratic Party certificates of authorization as well as the underlying designating petitions for each named Respondent-candidates, and removing them as candidates for the September 10, 2013 primary election and November 5, 2013 general election, for the public offices in their respective political subdivisions, located in the County of Erie and State of New York, and as more particularly described in "Exhibit B" of the Petitioner's papers; and
2. Directing the Respondent, ERIE COUNTY BOARD OF ELECTIONS, to remove their names from the September 10, 2013 primary election and November 5, 2013 general election ballots on all machines, absentee, affidavit, emergency and other paper ballots; and
3. Granting the Petitioners such other, further and different relief as the Court may deem just an appropriate; and it is further

ORDERED, that service of a conformed copy of this Order and underlying Verified Petition and exhibits, upon the Respondents, shall be deemed good and sufficient service if accomplished as follows:

1. Respondent, ERIE COUNTY BOARD OF ELECTIONS: by delivery to a person authorized to accept such service at the offices of said Respondent; and

2. Respondent-CANDIDATES (as listed in EXHIBIT B): by personal service on the Respondent-CANDIDATE, or alternatively by serving upon a person of suitable age and discretion at the Respondent-Candidates address, or, without the showing of repeated efforts to effect the aforementioned manner of service, by affixing a copy of this order and the papers upon which it is granted to the outer door of the address of the Respondent-CANDIDATE and also by regular mail; and it is further

3. Respondent-ERIE COUNTY DEMOCRATIC COMMITTEE and the EXECUTIVE COMMITTEE OF THE ERIE COUNTY DEMOCRATIC COMMITTEE: By serving either the County Chair or the County Party Secretary by any of the methods authorized under CPLR, including but not limited to, by personal service of the County Chair or Party Secretary, or alternatively on the ERIE COUNTY DEMOCRATIC COMMITTEE and EXECUTIVE COMMITTEE OF THE ERIE COUNTY DEMOCRATIC COMMITTEE by a person authorized to accept service, or a person of suitable age and discretion at the address of the ERIE COUNTY DEMOCRATIC COMMITTEE, or, without the showing of repeated efforts to effect the aforementioned manner of service, by affixing a copy of this order and the papers upon which it is granted to the outer door of the address of the Respondent- ERIE COUNTY DEMOCRATIC COMMITTEE and EXECUTIVE COMMITTEE OF THE ERIE COUNTY DEMOCRATIC

COMMITTEE, Party Chairman or Party Secretary, and by regular mail; and it is further

4. Respondent- NEW YORK STATE BOARD OF ELECTIONS: By mailing a copy to said Respondent at its offices at 40 Steuben Street, Albany, New York 12207, by US Postal Service, Express Mail and/or personal delivery to a person authorized to accept said service; and

5. Respondent- JEREMY J. ZELLNER and DENNIS E. WARD, in their capacity as Chairman (and Presiding Officer) and Secretary respectively, by any methods authorized under CPLR including, but not limited to, by personal service on the Respondent-JEREMY J. ZELLNER and DENNIS E. WARD, or alternatively on a person of suitable age and discretion at the address of the Respondent JEREMY J. ZELLNER and DENNIS E. WARD, or, without the showing of repeated efforts to effect the aforementioned manner of service, by affixing a copy of this order and the papers upon which it is granted to the outer door of the address of the Respondent JEREMY J. ZELLNER and DENNIS E. WARD and by regular mail; and it is further

ORDERED, that all personal service or alternate service shall be done by 11:59 P.M. on Thursday, July 25, 2013; and it is further

ORDERED, that Respondent, ERIE COUNTY BOARD OF ELECTIONS, shall produce to the Court on the return date hereof the original Certificate of Authorization and other relevant documents; and it is further

ORDERED, that the Respondents shall submit responding papers to the Court and to Petitioners' counsel, no later than the 8th day of August, 2013, and it is further Ordered that reply papers are to be served by August 12, 2013.

Hon. JOSEPH R. GLOWINIA ~~FREDERICK J. MARSHALL~~ J.S.C.

GRANTED: **GRANTED**

JUL 23 2013

BY Carol M. Williams
CAROL M. WILLIAMS
COURT CLERK

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

In the Matter of the Application of

KEVIN R. HARDWICK
EDWARD A. RATH
LEONARD K. PERO
JEFFREY W. GIER
CHRISTOPHER K. ARONICA
RAYMOND A. BILLICA
JAMES B. TOMKINS
JAMES MAYROSE

VERIFIED PETITION

Petitioners

-vs-

Index No. I 2013-002178

DENNIS E. WARD and RALPH M. MOHR,
As Commissioners of and constituting
The ERIE COUNTY BOARD OF ELECTIONS;

NEW YORK STATE BOARD OF ELECTIONS; and

ERIE COUNTY DEMOCRATIC COMMITTEE; and

EXECUTIVE COMMITTEE OF THE ERIE COUNTY
DEMOCRATIC COMMITTEE; and

JEREMY J. ZELLNER, Chair of the Erie County
Democratic Committee and Presiding
Officer of a Purported Authorized Meeting; and

DENNIS E. WARD, Secretary of the Erie County
Democratic Committee and Secretary of a Purported
Authorization Meeting; and

Respondents,

and,

WILLIAM C. CONRAD III,
ALAN K. GETTER,
COLLEEN M. SIENER,

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PAULETTE R. RENALDO,
JAMES P. DePASQUALE,
DAVID J. ARCARA,
PAUL J. CLARKSON,
DAWN M. SPIRES,
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WILLIAM M. STANLEY,
LEON E. BERNER,
JULIE L. LATHROP,
ERIK M. POLKOWSKI,
MICHAEL J. SHERY

Respondent-Candidates.

A proceeding brought pursuant to New York State Election Law §1-106, §16-102, §16-116, and §6-120 for the purpose of invalidating certain authorizations purportedly issued by the Erie County Democratic Committee and the Executive Committee of the Erie County Democratic Committee.

PETITIONERS, as and for their Verified Petition, pursuant to Election Law §16-102, §16-116, §6-120 and §1-106, do hereby alleged, by their attorney, EMILIO COLAIACOVO, ESQ.,

1. This Petition is brought pursuant to §1-106, §16-102, §16-116 and §6-120 of the New York State Election Law for the purpose of invalidating an authorization purportedly issued by the Erie County Democratic Committee and more particularly by the Executive Committee of the Erie County Democratic Committee.

PROCEDURAL POSTURE

The identification of the Petitioners and Respondents

2. The Petitioners are aggrieved candidates as contemplated by §16-102 of the New York State Election Law.

3. The Petitioners are candidates for public office in different subdivisions in Erie County. The authorizations purportedly designate opponents for the office each Petitioner seeks.

4. Pursuant to §16-102, the Petitioners have standing to commence this proceeding.

5. Made a part of this Petition are the names, addresses and listing of Public Office or Party Position sought by each particular Petitioner. A copy of said listing is annexed hereto and made a part hereof as "EXHIBIT A".

6. The Respondent, ERIE COUNTY BOARD OF ELECTIONS, and Respondent, NEW YORK STATE BOARD OF ELECTIONS, are entities authorized to conduct all elections within their appropriate subdivision. In this particular matter, the Respondent, ERIE COUNTY BOARD OF ELECTIONS, is authorized to accept the filing of a Certificate of Authorization seeking to designate candidates for public office. Respondents, DENNIS E. WARD, and RALPH M. MOHR, are the respective Commissioners of the ERIE COUNTY BOARD OF ELECTIONS.

7. The RESPONDENT, ERIE COUNTY DEMOCRATIC PARTY, is a county-wide organization affiliated with the New York State Democratic Party,

which has its own rules that are filed with the Respondent, ERIE COUNTY BOARD OF ELECTIONS and NEW YORK STATE BOARD OF ELECTIONS.

8. The Respondent, EXECUTIVE COMMITTEE OF THE ERIE COUNTY DEMOCRATIC COMMITTEE, is a duly authorized committee of the Respondent, ERIE COUNTY DEMOCRATIC COMMITTEE, organized pursuant to its own rules that, on or about July 13, 2013, purportedly met to authorize candidates by the Democratic Party for the election to public offices to be voted on at the primary election to be held on the 10th day of September, 2013 and at the general election, to be held on the 5th day of November, 2013.

9. The Respondent, JEREMY J. ZELLNER, is the duly elected Chairman of the Erie County Democratic Committee and purportedly presided over the Executive Committee meeting held on July 13, 2013 wherein candidates were purportedly nominated by the Democratic Party for election to public office.

10. The Respondent, DENNIS E. WARD, is the duly elected Secretary of the Erie County Democratic Committee and purportedly acted as Secretary of the Executive Committee meeting held on July 13, 2013 wherein candidates were purportedly nominated by the Democratic Party for election to public office.

11. The purported certificate of authorization purports to nominate several candidates for public office by the Democratic Party. A list of their names, addresses and public office or party position sought is annexed hereto and made a part hereof as "EXHIBIT B.

STATEMENT OF FACTS

12. On or about July 13, 2013, the Executive Committee of the Erie County Democratic Committee allegedly convened and held a meeting to authorize the designation of candidates for the nomination of the Democratic Party for various public offices.

13. Each of the aforementioned Respondent-Candidates is not enrolled members of the Democratic Party, but instead other parties recognized by the State of New York. To appear on the Democratic Party ballot for the aforesaid offices, a Certificate of Authorization, or commonly referred to as a Wilson-Pakula. A Wilson Pakula is an authorization given by a political party to a candidate for public office in the State of New York which allows a candidate not registered with that party to run as its candidate in a given election.

14. At its meeting on July 13, 2013, pursuant to its rules and §16-120 of the Election Law, the Executive Committee of the Erie County Democratic Committee purportedly authorized candidates for office, in particular County Legislator (4th and 6th Legislative District), Town Clerk in the Town of Aurora, Town Highway Superintendent in the Town of Aurora, Supervisor in the Town of Brant, Town Board member in the Town of Brant, Supervisor in the Town of Colden, Town Councilman in the Town of Colden, Town Highway Superintendent in the Town of Colden, Town Clerk in the Town of Evans, two Town Councilman seats in the Town of Grand Island, Town Highway Superintendent in the Town of Grand Island, Supervisor for the Town of Marilla, Town Councilman for the Town of Marilla, Town Councilman for the Town of Newstead, and Town Councilman (2

year term) in and for the Town of Orchard Park. Said authorization was signed by the Respondent, JEREMY J. ZELLNER, in his capacity as Presiding Officer, and DENNIS E. WARD, in his capacity of Secretary. Said authorization was signed on July 15, 2013. A copy of said Certificate Authorization is annexed hereto and made a part hereof as "EXHIBIT C".

15. Said Certificate of Authorization was mailed by the Respondent, ERIE COUNTY DEMOCRATIC COMMITTEE. Said envelope containing the aforesaid Certificate of Authorization is dated July 16, 2016. A copy of said envelope is annexed hereto and made a part hereof as "EXHIBIT D".

ARGUMENT

The untimely filing of the aforesaid Certificate of Authorization is a fatal defect and renders it invalid

16. Each year, the New York State Board of Elections promulgates a political calendar that sets forth and makes reference to specific dates that control the filing of certain instruments, such as a petition or authorization. These dates are based upon the statutory provisions in effect at the time of publication. A copy of said political calendar is annexed hereto and made a part hereof as "EXHIBIT E".

17. Pursuant to New York State Election Law and the aforementioned political calendar, the last date to authorize designations was July 15, 2013. This is consistent with Election Law §6-120(3) which provides that a certificate of authorization "must be filed not later than four days after the last day to file the designating petitions." Pursuant to the political calendar, the last day to file

designating petitions was July 11, 2013. Thus, the last day to file the certificate of authorization was to be July 15, 2013.

18. By evidence of the envelope bearing the post mark, the Respondent, ERIE COUNTY DEMOCRATIC COMMITTEE, mailed said authorization on the 16th day of July, 2013. On its face, the certificate of authorization was mailed subsequent to the deadline established by Election Law §6-120(3).

19. Pursuant to Election Law §1-106(1), "all papers sent by mail in an envelope postmarked prior to midnight of the last day of filing shall be deemed timely filed and acceptance for filing when received."

20. It is well established case law that the untimely filing of a certificate of authorization is a "fatal defect" and the judiciary is foreclosed from fashioning any exceptions. *See* Election Law §1-106(2); Amo v. Orange County Board of Elections, 286 A.D.2d 454, 730 N.Y.S.2d 249 (2nd Dept. 2001); Plunkett v. Mahoney, 76 N.Y.2d 848, 560 N.Y.S 2d 276 (1990); Matter of Hicks v. Eagan, 166 A.D.2d 735, 561 N.Y.S.2d 485 (1990).

21. In light of the well-established fatal error, it is error for a court to grant leave to file a certificate of authorization nunc pro tunc or to permit any late filing, notwithstanding any good faith excuse. Cosgrove v. Sunderland, 253 A.D.2d 504, 676 N.Y.S.2d 868 (2nd Dept. 1998).

22. Regardless of any sympathetic arguments, the court cannot allow any exceptions. To relax the mandatory filing requirements would not only render the various deadlines set forth in the Election Law as utterly meaningless, but it would

also interject confusion and inequality into a process where the Legislature plainly intended stability and uniformity to prevail. Matter of Esiason v. Washington County Board of Elections, 220 A.D.2d 878, 632 N.Y.S.2d 315 (3rd Dept. 1995). The Court is not permitted to ignore the specific statutory mandate as set forth in Election Law §1-106(2). In foreclosing the fashioning of exceptions, the Courts have intended not to allow late filing on one instance and preclude it in another. To that end, all late filings have been ruled untimely and invalid.

23. In light of the aforesaid authority and the plain view that the aforementioned certificate of authorization was postmarked on July 16, 2013, a day after the deadline so imposed by Election Law §6-120(3), the authorization is null and void and must be ruled invalid.

24. Since under Election Law §6-120, the candidacy of a non-party member cannot be deemed viable without a valid certificate of authorization from a different political party, it follows that the Democratic Party designating petitions of the Respondent-candidates herein must be also invalidated.

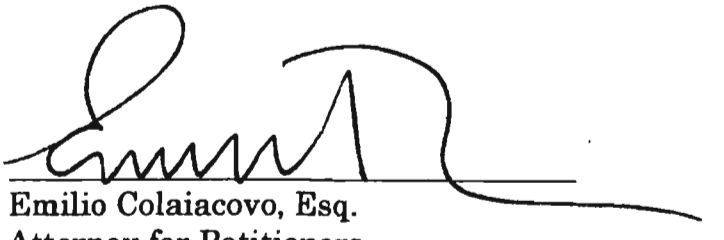
25. Accordingly, the Court should grant the relief requested herein and invalidate the certificate of authorization for the upcoming primary and general elections, where applicable.

WHEREFORE, the Petitioners request that this Court grant there relief

herein requested, to wit:

1. Invalidating the purported Democratic Party certificates of authorization as well as the underlying designating petitions for each named Respondent-candidates, and removing them as candidates for the September 10, 2013 primary election and November 5, 2013 general election, for the public offices in their respective political subdivisions, located in the County of Erie and State of New York, and as more particularly described in "Exhibit B" of the Petitioner's papers; and
2. Directing the Respondent, ERIE COUNTY BOARD OF ELECTIONS, to remove their names from the September 10, 2013 primary election and November 5, 2013 general election ballots on all machines, absentee, affidavit, emergency and other paper ballots; and
3. Granting the Petitioners such other, further and different relief as the Court may deem just an appropriate; and it is further

DATED: July 23, 2013
Buffalo, New York



Emilio Colaiacovo, Esq.
Attorney for Petitioners
BOUVIER PARTNERSHIP LLP
350 Main Street
Suite 1400
Buffalo, New York 14202
(716) 856-1344