Take notice that the last page of the within Decision & Order gives notice pertaining to the taking of appeals pursuant to ADM 2024-0308.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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In the Matter of the Application of

PATRICK CARROLL and MONICA L. FERGUSON,

Petitioners,

-against-

P.T. THOMAS,

Respondent-Candidate,

and

THE ROCKLAND COUNTY BOARD OF ELECTIONS,

Respondent,

For an Order Pursuant to §§16-100, 16-102 and 16- 116 of the Election Law, declaring invalid the designating petition purporting to designate Respondent-Candidate for the Public Office of Member, New York State Assembly for the 96th Assembly District in the Democratic Party primary election to be held on June 25, 2024 and Restraining the Board of Elections from Printing and Placing the Name of Said Candidate Upon the Official Ballots of Such Primary Election.

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DECISION & ORDER

Index No. 032125/2024
Motion Sequence No. 1

HON. DAVID FRIED, A.J.S.C.

The papers filed electronically via NYSCEF numbered 1 through and including 17 were read and considered herein, along with the record of the hearing conducted before this Court on April 23 – 24, 2024, and the various exhibits entered into the record of same. Upon such reading and consideration, the Litigation Petition is disposed as follows:

BACKGROUND & CONTENTIONS

Petitioners Patrick Carroll and Monica L. Ferguson (individually and or collectively, "Petitioner") commenced this action by the filing of a Petition ("Litigation Petition") with exhibit (NYSCEF Doc. Nos. 1 and 4, respectively) and proposed Order to Show Cause (NYSCEF Doc. No. 2) on April 18, 2024.

Petitioner seeks an Order, pursuant to New York State Election Law §§16-100, 16-102 and 16- 116, invalidating a certain Designating Petition ("Designating Petition") filed with Respondent Rockland County Board of Elections ("BOE") purporting to designate Respondent-Candidate P.T. Thomas ("Respondent-Candidate") as a Democratic Party candidate for the public office of Member, New York State Assembly, 96th State Assembly District ("Public Office"), in connection with the Primary Election scheduled to be conducted on June 25, 2024 ("Primary").

This Court issued the Order to Show Cause underlying this action on April 18, 2024 (NYSCEF Doc. No. 6). On April 21, 2024, counsel for Respondent-Candidate submitted a letter to the Court in which an adjournment of the Litigation Petition/Order to Show Cause return date was sought as a result of the BOE having not completed its proceedings in connection with the Designating Petition (NYSCEF Doc. No. 8). In response to said letter, this Court conducted a virtual conference at which time all counsel appeared (NYSCEF Doc. No. 10). The virtual conference resulted in the return date being adjourned to the afternoon of the original return date contained within the Order to Show Cause, thus enabling the BOE to complete its proceedings.

The Litigation Petition (NYSCEF Doc. No. 1) alleges, in pertinent part, as follows: that Petitioner Carroll is a candidate for the Public Office; that Petitioner Ferguson is a duly qualified voter eligible to vote in the Primary; that the Designating Petition was filed with the BOE on or about April 4, 2024; that Petitioner Carroll is an Aggrieved Candidate for the same Public Office in the same Primary; that general objections pertaining to the Designating Petition were filed with the BOE on or about April 8, 2024 ("General Objections"); that specific objections pertaining to the Designating Petition were filed with the BOE on or about April 15, 2024 ("Specific Objections")[1]; that the Designating Petition is insufficient, ineffective, invalid, and not in conformity with the requirements of, among other things, the Election Law; that by virtue of the allegations contained within the Specific Objections, that the Designating Petitions are null and void; that as a result of the insufficient nature of the Designating Petition, that the BOE should be restrained from printing the Respondent-Candidate's name upon the official ballot of the Primary; that at the time of filing the Litigation Petition, that the BOE had not yet completed its proceedings relevant to the Designating Petition; that subsequent to the BOE proceeding, that Petitioner would require relief from the Supreme Court as to many of the Specific; that the Designating Petition is invalid for reasons alleged in ¶12a-w of the Litigation Petition; that the Designating Petition is permeated with fraud ("Fraud Allegation"); that as of the filing of the Litigataion Petition, that Petitioner anticipates determinations of the BOE, adverse to Petitioner, to be erroneous,

[1] The Specific Objections are annexed to the Litigation Petition as its Exhibit 1 (NYSCEF Doc. No. 4)

arbitrary, capricious, and inconsistent with the Election Law; and that by virtue of this Supreme Court action, that Petitioner will substantiate the Specific Objections not sustained by the BOE.

Respondent-Candidate filed his Verified Answer on April 22, 2024 (NYSCEF Doc. No. 9). By virtue of said Verified Answer, Respondent-Candidate denies various allegations contained within the Litigation Petition and alleges that the Designating Petition was duly and timely filed. Respondent-Candidate invokes affirmative defenses and objections in points of law at ¶a-e of his Verified Answer. Among other things, Respondent-Candidate alleges that the Litigation Petition and Specific Objections are not plead with sufficient specificity and particularity, and notes that as of the filing of the Litigation Petition, that the BOE had not yet rendered its determination(s).

The BOE filed its Verified Answer on April 22, 2024 (NYSCED Doc. No. 11). By virtue of said Verified Answer, the BOE alleges as follows: that the Designating Petition, consisting of 113 total pages, was duly and timely filed with its offices; that the Petitioner duly and timely filed the General Objections; that the BOE ruled the Designating Petition to be invalid; that the 113 pages of the Designating Petition contain 726 total signatures; that 243 Specific Objections of the Petitioner were sustained at the BOE; that 483 signatures remained once the BOE subtracted the aforesaid 243 signatures from the aforesaid 726 submitted signatures; that in order to be valid, the Designating Petition required 500 valid signatures; that certain of the Specific Objections could not be ruled upon by the BOE as such Specific Objections exceeded the ministerial role of the BOE, and that as to said Specific Objections, the corresponding signatures were declared valid by the BOE; that the BOE defers to the Supreme Court for matters outside the BOE's jurisdiction.

A hearing on the Litigation Petition was conducted in this Court on April 23-24, 2024 ("Hearing"). Prior to the commencement of the Hearing, Petitioner filed a Bill of Particulars (NYSCEF Doc. No. 14). At the outset of the Hearing, counsel for the BOE confirmed to this Court that the BOE had, at that time, completed its proceedings – subsequent to the filing of its Verified Answer, but prior to the commencement of the Hearing in the Supreme Court. The BOE reached a determination that the Designating Petition is valid (Transcript, April 23, 2024, pg. 2, lns. 20-25).

The BOE determination of validity was calculated by the BOE, upon the conclusion of its proceedings, as follows: 726 submitted signatures minus 225 objections sustained by the BOE equals 501 remaining signatures.[2]

All parties were represented by counsel at the Hearing. The following witnesses were called by Petitioner: Patricia Giblin, *Commissioner of Elections*; Michelle Reilly, *Deputy Commissioner of Elections*. The following witness was called by Respondent-Candidate: Jose Pena, a *carrier of the Designating Petition*. Although Petitioner originally intended to call an additional witness in connection with the Fraud Allegation, Petitioner withdrew said Fraud Allegation and decided not to call said witness (NYSCEF Doc. No. 15). All Hearing exhibits were admitted into evidence on consent, without objection.

[2] Five hundred (500) valid signatures are required to maintain the validity of the Designating Petition.

During the course of the hearing, Respondent made various oral motions and applications. The Court reserved pending the issuance of the within Decision & Order such that a full record was established, in the event of appellate review, and with consideration for the expedited nature of Election Law proceedings.

With their consent, in lieu of oral summations, counsel submitted written closings in furtherance of their respective positions (NYSCEF Doc. Nos. 16 and 17). The Court now addresses and determines, in turn, *de novo*, the various allegations and applications raised herein.

DISCUSSION & ANALYSIS

As a threshold matter, Respondent-Candidate's oral application to dismiss the Litigation Petition, alleging that Petitioner's Fraud Allegation is neither particular nor specific, is denied, and the merits need not be reached; Petitioner withdrew his Fraud Allegation before this Court (NYSCEF Doc. No. 15). As such, the issue is moot. To the extent that Respondent-Candidate seeks dismissal, on the same grounds but as to allegations in the Petition other than the now-withdrawn Fraud Allegation, it is noted that as recent as 2022, the Second Department, in *Matter of Baldeo v. Bd. of Elections in the City of New York*, (205AD3d 844, 845 [2d Dept 2022], determined that in invalidating proceedings such as this, brought pursuant to the Election Law, specificity requirements are satisfied where the pleading incorporates, by reference, objections made to the Board of Elections. See also, *Lancaster v. Nicolas*, 153 AD3d 829, 60 NYS3d 391 (2nd Dept. 2017). Such is the case here (see, NYSCEF Doc. Nos. 1 and 4)

Before this Court, Respondent-Candidate argued that although apprised of Petitioner's Specific Objections before the Hearing, since certain issues were not first argued before the BOE, that Petitioner waived his right to bring such issues before the Supreme Court. This argument is without merit.

It is undisputed that Petitioner Carroll is a candidate in the Primary, for the nomination of the Democratic Party, as its candidate for the Public Office. Under such circumstances, Petitioner has standing as an aggrieved candidate to maintain this proceeding. See, *McGuire v. Gamache*, 22 AD3d 614, 614 (2d Dept 2005); and *Matter of Maher v. Board of Elections of Nassau County*, 297 A.D.2d 396, 746 N.Y.S.2d 618 (2nd Dept. 2002).

Moreover, "a special proceeding under Election Law §16-102 is a '*de novo*' proceeding in which the court must independently determine whether the candidate qualifies for ballot access (*Matter of Ellman v. Grace*, 75 Misc 3d 776, 790 [Sup Ct, Albany County 2022]). In *Ellman*, the Court distinguished a hearing before the Board of Elections compared with one in court, finding that "while the administrative proceedings before the [Board of Elections] may frame the issues for determination at the court hearing and bear on the standing of the petitioners to sue, the court is not sitting in review

of the manner in which the [Board of Elections] arrived at its administrative ruling" (*Id.*). See also, *Mandell v. Board of Elections of City of New York*, 164 A.D.3d 719, 83 N.Y.S.3d 326 (2nd Dept. 2018).

Respondent requests that this Court direct the BOE to amend its final determination(s) to reflect what Respondent deems to be certain mathematical errors. In the aforementioned case of *Matter of Ellman v. Grace*, 75 Misc 3d 776, 790 (Sup Ct, Albany County 2022), the Court held that "there is no authority for the court to remand these proceedings to the [Board of Elections] for rehearing, reverse the [Board of Election]'s administrative ruling and somehow shift the burden to the objectors and [others] to sue for invalidation, or otherwise accord to [Respondent-Candidate] the equitable remedy that he seeks" (*Matter of Ellman, Id.*). Notably, in the *Matter of Ellman, Id.*, the very same Respondent-Candidate's counsel argued against the remedy he now seeks here. Additionally, the Board of Elections may not re-open a hearing on a petition. See, *Tabacco v. Vitucci*, 59 A.D.3d 645 (2nd Dept., 2009); *Matter of Frascone v. Rockland County Bd. of Elections*, (87 AD3d 667, 668 (2d Dept 2011); *Matter of Morales v. Burgos*, 194 AD3d 888 (2d Dept 2021); and *Pataki v. Hayduk*, 87 Misc 2d 1095, 1097 (Sup Ct, Westchester County 1976 affd 55 AD2d 861 [2d Dept 1976]).

Respondent-Candidate, without having brought an Election Law Petition or Cross-Petition before this Court, argues that this Court should permit him to file a Cross-Petition, reinstate four signatures on page 44 of the Designating Petition (notwithstanding that Hearing Exhibit BOE-12 demonstrates that said signatures were <u>not</u> invalidated by the BOE) and, for the first time, by way of Respondent-Candidate's closing argument on written submission, seeks to have nine signatures on page 15 of the Designating Petition, which were invalidated by the Board of Elections, validated by this Court. Said arguments of Respondent-Candidate are also without merit. There is no validating proceeding, or any other proceeding, brought by Respondent-Candidate before this Court.

> "To properly institute a proceeding raising a challenge under Election Law §16–102, a petitioner must commence the proceeding and complete service on all the necessary parties within the period prescribed by Election Law §16–102(2)" (*Matter of McCrory v. Westchester County Bd. of Elections*, 216 A.D.3d 857, 858, 188 N.Y.S.3d 658 [internal quotation marks omitted]; see Election Law §16–116; *Matter of Stora v. New York State Bd. of Elections*, 208 A.D.3d 1213, 1213–1214, 174 N.Y.S.3d 137). "The courts of this State have repeatedly determined that the filing deadlines in the Election Law are mandatory and absolute, and are not subject to the discretion of the courts or the judicial fashioning of exceptions, regardless of how reasonable they may appear to be" (*Matter of Jasikoff v. Commissioners of the Westchester County Bd. of Elections*, 183 A.D.3d 669, 670, 121 N.Y.S.3d 686; see *Matter of Seawright v. Board of Elections in the City of N.Y.*, 35 N.Y.3d 227, 233, 127 N.Y.S.3d 45, 150 N.E.3d 848; *Matter of Hutson v. Bass*, 54 N.Y.2d 772, 774, 443 N.Y.S.2d 57, 426 N.E.2d 749)." See, *Stern v. Putnam County Board of Elections*, 219 A.D.3d 1269, 1270-1271, 195 N.Y.S.3d 755 (2nd Dept. 2023).

Moreover, Respondent-Candidate's oral application to submit a cross-motion and or his request, contained within his closing argument, that this Court validate signatures on page 15 of his Designating Petition, is an attempt to commence an otherwise time-barred proceeding addressing the validity of his own Designating Petition, which, cannot relate back to the date of the invalidating petition. See *Matter of Aguirre v. Hernandez*, 131 AD3d 716, 717 (2d Dept 2015); and *Matter of MacKenzie v. Ghartey*, 131 AD3d 638, 639 92d Dept 2015).

The Court will now address the various page and or line objections/allegations raised herein.

ALLEGATION (Re: Pgs. 12 & 28 of the Designating Petition) – That the signature of the subscribing witness does not match either that which is on record with the BOE or the name contained within the statement of the witness.

DISCUSSION & RULING: As to the *Statement of Witness* pertaining to Pages 12 & 28 of the Designating Petition, Petitioner has asserted Specific Objections that the signature of the witness does not match that signature which is reflected in the records of the BOE and that said signature is a forgery (Hearing Exhibit BOE-2).

As to Page 12, the name "Jose R. Pena" with an address of 32 Bridge Street, Garnerville, is printed in the *Statement of Witness*. Thereafter, the *Statement of Witness* is signed as follows: "Joseph R. Pena" (Hearing Exhibit BOE-1a). As to Page 28, the name "Jose R. Pena" with an address of 32 Bridge Street, Garnerville, is printed in the *Statement of Witness*. Thereafter, the *Statement of Witness* is signed as follows: "Joseph R. Pena Jr." (Hearing Exhibit BOE-1a).

Hearing Exhibit Petitioner-1, in evidence, is the Voter Record Report of Jose R. Pena Jr., with an address of 32 Bridge Street, Garnerville. Said Voter Record Report contains an image of that voter's signature which reads "Jose R Pena Jr". The voter reflected in said Voter Record Report is an enrolled Democrat. The Court, as the finder of fact herein, determines that notwithstanding that the Voter Record Report includes "Jose" within the signature and the Statement of Witness on both Pages 12 & 28 includes "Joseph" within the signature, the handwritings are similar to such an extent that a reasonable person would conclude that all signatures at issue were penned by the same person.

Further, Respondent-Candidate produced Mr. Pena as a witness at the Hearing. Mr. Pena testified, among other things: that he resides at 32 Bridge Street, Garnerville (Transcript, April 24, 2024, pg. 100, ln. 21-22); that he has been known by both Jose and Joseph (Transcript, April 24, 2024, pg. 103, lns. 12-17); and, that he is the person who witnessed Pages 12 & 28 of the Designating Petition (Transcript, April 24, 2024, pgs. 102-104).

The documentary evidence before the Court, coupled with the testimony of Mr. Pena, serve to confirm the validity of the witness' signature as contained within the *Statement of Witness* on both Pages

12 & 28 of the Designating Petition. As such, the corresponding objections contained within Petitioner's Specific Objections, is denied. This section has no impact on the counting of signatures.

ALLEGATION (Re: Pg. 44 of the Designating Petition) – That the BOE did not rule upon the Fraud Allegation. Page 44 was signed by Susan Alex but then later crossed out and signed by Joseph Jacob. As such, fraud is alleged. Further, the following pages of the Designating Petition which Joseph Jacob also witnessed, should be invalidated: 1, 2, 3, 4, 5, 14, 16, 22, 24, 34, 37, 39, 42, 69, 70, and 71.

DISCUSSION & RULING: Petitioner waived the Fraud Allegation before this Court (NYSCEF Doc. No. 15). As such, the issue is moot. Notwithstanding the foregoing, the Court notes that there is no evidence of fraud contained within the record hereof. This section has no impact on the counting of signatures.

ALLEGATION (Re: Pg. 50 of the Designating Petition) – That the BOE did not rule on the enrollment status of Jean Francois, the subscribing witness of Page 50.

DISCUSSION & RULING: Petitioner contends that the subscribing witness of Page 50 of the Designating Petition is not enrolled in the Democratic Party, and therefore, that said subscribing witness is not eligible to witness signatures signed to the Designating Petition. Page 50 contains a total of 3 signatures purportedly witnessed by Jean Francois. During its review of the Specific Objections, the BOE invalidated two of the three signatures on Page 50[3] due to two of the signers on that page residing outside of the 96th State Assembly District. Hearing Exhibit BOE-3 does not indicate that the Board assessed the Specific Objection pertaining to Jean Francois' party enrollment. Thus, one signature remains in dispute. This issue is properly before the Supreme Court for *de novo* review. The Deputy Commissioner of the BOE testified that the subscribing witness of Page 50, Jean Francois, is not a registered Democrat (Transcript, April 23, 2024, pg. 71, lns. 13-14). Hearing Exhibit BOE-9, the Voter Record Report of Jean Francois, confirms that Jean Francois is not a registered Democrat. Respondent-Candidate has offered no evidence to the contrary.

Election Law §6-132(2) requires that a subscribing witness to a designating petition be an enrolled voter in the same political party as the voters qualified to sign the petition. Failure to be enrolled in the same political party is a substantive requirement of witness eligibility and not an inconsequential violation of the statute. See, *Hochhauser v. Grinblat*, 307 AD2d 1007, 1008, 763 N.Y.S.2d 508 (2d Dept 2003); and *Matter of Staber v. Fidler*, 65 NY2d 529, 534 [1985]). It is uncontested that the subscribing witness is not enrolled in the Democratic Party. As such, Jean Francois is not eligible to serve as a subscribing witness to the Designating Petition.

Accordingly, the singular signature heretofore remaining on Page 50 – line 2 thereof – is invalidated.

[3] Lines 1 and 3 of Page 50 were invalidated by the BOE.

ALLEGATION (Re: Pg. 53 of the Designating Petition) – That the BOE did not rule on the purported alteration of the date in the witness section.

DISCUSSION & RULING: Page 53 of the Designating Petition purports to contain a total of three signatures. Of said three signatures, the BOE previously invalidated the signature appearing at line 1 thereof on the basis that the signer at line 1 is not enrolled as a Democrat. Thus, two signatures remain as per the BOE. Notwithstanding the foregoing, Hearing Exhibit BOE-4 establishes that the BOE did not consider the Specific Objection wherein Petitioner contends that the date in the subscribing witness statement was altered without initialing. This issue is properly before the Supreme Court for *de novo* review. Respondent opines, but without any evidence, that at issue is little more than an overwriting, in the same handwriting. The Commissioner of the Rockland County Board of Elections testified that to her, the date appears to have been altered (Transcript, April 23, 2024, pg. 31, lns. 22-24). In assessing this specific testimony of the Commissioner, the Court has balanced that although the Commissioner is not a handwriting expert *per se*, her experience as Commissioner since 2017 coupled with her employment at the BOE for the past 17 years (Transcript, April 23, 2024, pg. 19, lns. 4-8) in other role(s), certain provides helpful insight in assessing whether an entry and or mark is an alteration, the result of penmanship, or something else. Thus, the testimony is insightful but not determinative as to the purported alteration. Upon observation, the Court, as the finder of fact herein, concludes that the date is altered without initialing. Respondent-Candidate did not produce the subscribing witness to testify at the Hearing nor otherwise offer any contrary evidence which could have, perhaps, swayed the Court differently.

> "Although an 'alteration of the [witness] statement which is unexplained and uninitialed will result in the invalidation of the petition sheet' even if the alterations 'resulted in the manifestation of correct information' (*Matter of McGuire v. Gamache*, 5 NY3d 444, 448 [2005], quoting *Matter of Jonas v. Velez*, 65 NY2d 954, 955 [1985]), "where an explanation for the uninitialed change is provided by affidavit or testimony adduced at a hearing, the underlying signatures need not be nullified" (*Matter of Curley v. Zacek*, 22 AD3d 954, 957 [2005]; see *Matter of Rosmarin v. Belcastro*, 44 AD3d 1055 [2007])." See, *Oberman v. Romanowski*, 65 A.D.3d 992, 993, 885 N.Y.S.2d 103 (2nd Dept. 2009).

Here, as set forth above, the date at issue is altered, lacks initials as to said alteration, and remains unexplained. Notwithstanding that Respondent-Candidate was given ample opportunity to do so, Respondent-Candidate did not produce the subscribing witness to testify at the Hearing nor take any other rehabilitative steps regarding same. The short time frames at issue in an Election Law proceeding of this nature are not prejudicial since the Specific Objections were known to Respondent-Candidate well before the Hearing and the filing of the Litigation Petition. Further, the altered date

renders the date indecipherable, running afoul of Election Law §16-130 which provides that "a designating petition must set forth in every instance the name of the signer, his or her residence address, town or city (except in the city of New York, the county), and the date when the signature is affixed." Compliance with said statute is required, as it constitutes a matter of substance and not of form. See *Matter of Stoppenbach v. Sweeney*, 98 NY2d 431 (2nd Dept. 2002]; *Avella v. Johnson*, 142 AD3d 1111 (2nd Dept. 2016); and *DiSanzo v. Addabbo*, 76 AD3d 655, 656 (2nd Dept. 2010).

Accordingly, the two signatures heretofore remaining on Page 53 – lines 2 and 3 thereof – are invalidated.

ALLEGATION (Re: Pg. 73 of the Designating Petition) – That the BOE did not determine whether the signature of the subscribing witness matches that which is contained within its records or, alternatively, constitutes fraud.

DISCUSSION & RULING: Page 73 of the Designating Petition purports to contain one signature, allegedly witnessed by "Carla Ortiz" (Hearing Exhibits BOE-1 & BOE-1A). The Specific Objections targeting Page 73 allege that the signature of the subscribing witness does not match that signature which the BOE has contained within its records and is a forgery; further, the Specific Objections allege that the signer of the *Statement of Witness* portion of Page 73 is not the same person who is listed in the first line of the *Statement of Witness* (Hearing Exhibit BOE-2). Petitioner contends that the signature of "Carla Ortiz" as contained within the records of the BOE, does not reasonably correspond to the signature on the *Statement of Witness*. Notably, "Carla" – both in the BOE's records (Hearing Exhibit BOE-10) and also on Page 73 of the Designating Petition – is spelled with a "C", while signed on Page 73, with a "K". In comparing the spelling and obvious stylistic differences of the two competing signatures, it is patently obvious that the two signatures are not that of the same person. To be sure, however, the Court has examined Hearing Exhibit BOE-13 which reveals that "Carla" with a "C" (who did not sign the Statement of Witness) is registered at the address appearing within the Statement of Witness, while "Karla" with a "K" does not appear within the BOE records at any address. Although mindful that it is not uncommon for people's signatures to perhaps change and vary over time, the Court is not willing to assume that the signature of this particular purported subscribing witness has changed so much so, that a new spelling is embraced. Respondent-Candidate has neither produced "Carla" nor "Karla" and the record is devoid of any credible explanation.

"Voters' signatures on designating petitions that do not meaningfully compare with the signatures on the same voters' registration forms should be invalidated (see *Matter of Rabadi v. Galan*, 307 A.D.2d 1014, 763 N.Y.S.2d 503). Indeed, "[t]o prevent fraud and allow for a meaningful comparison of signatures when challenged, the signature on the designating petition should be made in the same manner as on that signor's registration form" (*Matter of Henry v. Trotto*, 54 A.D.3d 424, 426, 862 N.Y.S.2d 605; see Election Law §6–134[10])." *Quercia v. Bernstein*, 87 A.D.3d 652, 928 N.Y.S.2d 346 (2nd Dept. 2011).

Notwithstanding the foregoing, the Court is not willing, on this record, to issue a determination of

fraud. The possibility of error certainly exists. Irrespective, the *Statement of Witness* is fatally defective, and the one signature contained on Page 73 is invalidated.

ALLEGATION (Re: Pg. 80 / Lines 7 & 8 of the Designating Petition) – That the BOE incorrectly determined that the challenge as to party enrollment only related to the signature on line 8 and not the signature on line 7.

DISCUSSION & RULING: The Specific Objections allege that the signatures appearing at lines 7 and 8 of Page 80 of the Designating Petition reflect individuals who are not enrolled as Democrats. Hearing Exhibit BOE-6 demonstrates that the BOE invalidated line 8, but not line 7. Thus, only line 7, specifically, is at issue here, *de novo*. Said Hearing Exhibit further demonstrates that the BOE entered the following text at lines 7 and 8 of the BOE Specific Objection Review worksheet: "SAME SIGN NOP". The signatures reflected at lines 7 and 8 are, at best, difficult to read. Notwithstanding, the printed names below said signatures are at least partially decipherable and the address next to each – 3 Stony Hill Lane, West Nyack – is clear. Hearing Exhibit BOE-11 is an address report for 3 Stony Hill Lane, West Nyack, which is the address appearing next to the signatures at both lines 7 and 8 of Page 80. As reflected in said Hearing Exhibit, of all those registered, whether politically unaffiliated or in any party, only one person has a name that is consistent with the printed names appearing at lines 7 and 8, to wit: Johncy Jimmy. Johncy Jimmy, by virtue of the printed name, is most certainly the signer at line 8. The BOE correctly invalidated the signature of Johncy Jimmy because, as reflected in Hearing Exhibit BOE-11, Johncy Jimmy is not an enrolled Democrat. As to line 7, either Johncy Jimmy signed duplicatively on that line too and should also be invalidated by virtue of not being enrolled as a Democrat, or, line 7 is signed by someone else. Of all the other names registered at the aforesaid address, as demonstrated by Hearing Exhibit BOE-11, there are only two voters enrolled as Democrats: Eileen V[ ] and Jolly V[ ]. First, neither the signature nor the printed name at line 7 appear consistent with either of the two aforesaid names. Second, and more compelling, both Eileen V[ ] and Jolly V[ ] are reported in Hearing Exhibit BOE-11 as having "MOVED" and are not assigned Voter Identification numbers. Accordingly, the Court concludes that based upon the evidence herein, the signer at line 7 of Page 80 is not a registered Democrat eligible to sign the Designating Petition. Respondent-Candidate has not offered any evidence nor produced the signer of line 7. The finding of the Court as to line 7 is consistent with the testimony of the Commissioner of the BOE who swore that the person who signed line 7 is not a registered Democrat (Transcript, April 23, 2024, pg. 43, lns. 8-10). It is of no consequence whether or not the same person signed lines 7 and 8 because the signer of line 8, Johncy Jimmy, as aforesaid, is also not an enrolled Democrat (*See also*, Testimony of Deputy Commissioner of the BOE, Transcript, April 23, 2024, pg. 78, lines 1-9). As noted, *supra*, the Specific Objections as to both lines 7 and 8 are that the signers of same are not enrolled Democrats (Hearing Exhibit BOE-2).

Accordingly, the signature on Page 80, line 7 is invalidated as it was obtained from one who was not enrolled in the Democratic Party. See, *Bee v. Sabbeth*, 207 A.D.2d 506, 615 N.Y.S.2d 934 [2nd Dept 1994]).

ALLEGATION (Re: Pg. 72 / Line 1 of the Designating Petition) – That the BOE did not determine that Torres was not enrolled.

DISCUSSION & RULING: Petitioner has withdrawn this allegation/objection (Transcript, April 23, 2024, pg. 47, lns. 17-19). As such, the issue is moot. This section has no impact on the counting of signatures.

ALLEGATION (Re: Pg. 87 / Line 1 of the Designating Petition) – That the BOE incorrectly counted the wrong year/date.

DISCUSSION & RULING: While Specific Objections were made as to lines 1, 2, and 10 of Page 87, only line 1 of said page is at issue herein. As to line 1, two Specific Objections were asserted: that the signor is not a Democrat and also that the date appearing on said line is outside the petition period. Hearing Exhibit BOE-8 demonstrates that in its initial review of the Designating Petition, that the signature at line 1 was invalidated by the BOE for reason of "Date Incorrect." This issue was raised, subsequently, at the hearing before the BOE. The Commissioner of Elections testified that one of the results of said BOE proceeding was a BOE determination to restore said signature in favor of Respondent-Candidate (Transcript, April 23, 2024, pg. 49 ln 20 – pg. 50 ln. 7). The issue is ripe for *de novo* review.

Line 1 of Page 87 is dated "03/25/26" which is a date that does not yet exist in time and does not accurately capture nor memorialize the accurate date upon which the signor purportedly signed line 1. "The failure of each signer and the subscribing witness to include the full date next to his or her signature on sheets . . . of the subject designating petition rendered the signatures on those sheets invalid (see Election Law §§6–130, 6–132[1], [2]; *Matter of DiSanzo v. Addabbo*, 76 A.D.3d 655, 906 N.Y.S.2d 607; *Matter of Vassos v. New York City Bd. of Elections*, 286 A.D.2d 463, 730 N.Y.S.2d 251; *Matter of DeBerardinis v. Sunderland*, 277 A.D.2d at 188, 717 N.Y.S.2d 892; *Matter of MacKay v. Cochran*, 264 A.D.2d 699, 695 N.Y.S.2d 113; cf. *Matter of Struble v. Chiavaroli*, 71 A.D.2d 1047, 420 N.Y.S.2d 797)." See, *Avella v. Johnson*, 142 AD3d 1111, 1113, 38 N.Y.S.3d 44 (2nd Dept. 2016).

> ". . . [T]he Supreme Court erred in failing to invalidate the signature contained on . . . the designating petition since there was no date written next to the signature (see *Matter of Vassos v. New York City Bd. of Elections*, 286 A.D.2d at 463, 730 N.Y.S.2d 251; *Matter of DeBerardinis v. Sunderland*, 277 A.D.2d at 187, 717 N.Y.S.2d 892; *Matter of Parra v. Shiffman*, 64 A.D.2d 934, 408 N.Y.S.2d 133; *Matter of Nunley v. Cohen*,

> 258 App.Div. 746, 15 N.Y.S.2d 104). Furthermore, as the subscribing witness wrote down the incorrect date on which two signatures were affixed to Sheet . . . of the designating petition, those signatures should have been invalidated (see *Matter of Kent v. Bass*, 83 A.D.2d 898, 442 N.Y.S.2d 123; *Matter of Nunley v. Cohen*, 258 App.Div. at 746, 15 N.Y.S.2d 104; see generally *Matter of Stoppenbach v. Sweeney*, 98 N.Y.2d at 433, 749 N.Y.S.2d 210, 778 N.E.2d 1040; *Matter of MacKay v. Cochran*, 264 A.D.2d 699, 699–700, 695 N.Y.S.2d 113)." See, *Matter of DiSanzo v Addabbo*, 76 A.D.3d 655, 656-657, 906 N.Y.S.2d 607 (2nd Dept. 2010).

In the *Matter of Kent v. Bass*, 83 A.D.2d 898, 442 N.Y.S.2d 123 (1981), one of the sheets in the designating petition contained a sequence of signatures dated July 21, 1981, and interspersed within said sequence, was a single signature dated "8–21–81". While the Appellate Division, Second Department, in *Kent, Id.*, overturned the Trial Court's decision striking the two signatures immediately following the signature bearing the "8–21–81" date (which the Trial Court also invalidated), said Appellate Court did state that the "8–21–81" date was an "obvious error." The Appellate Division did not restore the obviously erroneous date. Accordingly, in the case at bar, the incorrect date set forth on page 87, line 1 is incorrect and therefore, the signature on that line is invalid.

Further, it does not appear that the BOE, either preliminarily nor at their subsequent hearing, addressed the Specific Objection as to the party enrollment of the signor of line 1. While Petitioner's Bill of Particulars does not note the party enrollment issue, focusing, instead on the date issue as aforesaid, the entirety of the Specific Objections, including that which alleges incorrect party enrollment as to line 1, is annexed to the Litigation Petition (NYSCEF Doc. No. 4). The entirety of said Specific Objections are not only a part of Petitioner's pleading, but they are also record evidence before this Court. Hearing Exhibit BOE-2, the entirety of the Specific Objections raised by Petitioner, was admitted as evidence, on consent of Respondent-Candidate, without condition nor objection. Hearing Exhibit BOE-8 was also admitted as record evidence before this Court, on consent of Respondent-Candidate, without condition nor objection. That exhibit, BOE-8, confirms that the signor of line 1, Rajan Daniel, residing at 16 South Rockland Avenue, is a registered voter without a party affiliation (NOP), and, as such, is not an enrolled Democrat. Rajan Daniel is thus not qualified to sign the Designating Petition in this Democratic Primary. This fact, admitted into evidence with the consent of Respondent-Candidate, further stands for the invalidation of the signature appearing on line 1 of Page 87.

ALLEGATION (Re: Pg. 99 / Lines 2, 5, 6, 8, 9, & 10 of the Designating Petition) – That the BOE incorrectly determined that individuals were enrolled or failed to remove the required number of signatures from the challenged page.

DISCUSSION & RULING: Page 99 consists of a total of 10 purported signatures. Of said

10 purported signatures, Specific Objections target six of same. Hearing Exhibit BOE-5 pertains to Page 99 of the Designating Petition, the Specific Objections relating thereto, and the BOE rulings pertaining to same. At the BOE level, all six Specific Objections were sustained, to wit: the signors at lines 2, 5, 6, 9, and 10 were determined to not be enrolled Democrats, and the signor at line 8 was determined not to be a registered voter. Notwithstanding said 6 sustained Specific Objections, the BOE invalidated only 5 of the doomed 6. The Commissioner of Elections testified that this was an error on the part of the BOE and that, in fact, 6 signatures – not 5 – should have been invalidated at the BOE level (Transcript, April 23, 2024, pg. 40, lns. 2-23).

It is not for the Court, in this non-Article 78 proceeding, to stand in judgment of the BOE nor to correct its math. Nonetheless, the invalidating proceeding here is one of *de novo* review by the Supreme Court. Through the lens of *de novo* review, it is clear that all six specific objections relevant to page 99 should be granted. Hearing Exhibit BOE-5 demonstrates that: the signor at line 2 is not an enrolled Democrat; the signor at line 5 is not an enrolled Democrat; the signor at line 6 is not an enrolled Democrat; the signor at line 8 is not registered to vote; the signor at line 9 is not an enrolled Democrat; and the signor of line 10 is not an enrolled Democrat.

This issue is properly embraced within this proceeding: the Specific Objections are incorporated into Petitioner's pleading, in their entirety, as an exhibit thereto; the Bill of Particulars specifically asserts, as to Page 99, that the BOE "failed to remove the required number of signatures from the challenged page;" and Hearing Exhibit BOE-5 was admitted as record evidence, for *de novo* review, on consent of Respondent-Candidate, without condition nor exception. Most certainly, in light of the aforesaid, Respondent-Candidate was on notice of exactly what was before this Court. Accordingly, one additional signature is invalidated.

COMPUTATION

The Hearing commenced with 501 purportedly valid signatures, as per the BOE. The Court has concluded, as aforesaid, that seven (7) of said signatures are, in fact, invalid. Thus, subtracting seven (7) invalid signatures from the five-hundred-one (501) referenced signatures, results in a Designating Petition containing four-hundred-ninety-four (494) valid signatures, which is less than the 500-signature requirement.

Anticipating the possibility that the Court might invalidate the Designating Petition, Respondent-Candidate asserted both at the Hearing and in his written Closing Argument (NYSCEF Doc. No. 16), that the Court should exercise its discretion, as a matter of equity, to permit Respondent-Candidate to proceed by opportunity to ballot. In support of said assertion, Respondent-Candidate relies upon *Hunting v. Power*, 20 N.Y.2d 680 (1967); *Landry v. Mansion*, 65 A.D.3d 803 (3rd Dept., 2009); *Griffin v. Torres*, 131 A.D.3d 631(2nd Dept., 2015); *Harden v. Board of Elections*, 24 N.Y.2d 796 (1989); *Gray v. Hochberg*, 175 A.D.2d 892 (2nd Dept., 1991), and their progeny.

Respondent-Candidate further asserts as follows: that where the voters have clearly expressed a desire to have a candidate on the ballot and, here, to have a primary election for Member of the New York State Assembly in the 96th District, courts have looked at the intent of the voters and allowed for a petition invalidated on technical grounds – but close to the statutory number of signatures needed for designation – to give the voters a write-in primary; and, that in this case, there are a plethora of technical errors in the petition which, depending on this Court's rulings, would give rise to invalidation of the petition on technical grounds.

Petitioner submits that the Court cannot employ the equitable remedy requested by Respondent-Candidate because Respondent-Candidate's case law is inapplicable to the matter at bar. Petitioner asserts that Respondent-Candidate should not be permitted the affirmative relief of an opportunity to ballot, arguing that permitting such would destroy the need for any invalidating proceeding if a respondent could simply request that they be given a chance to run anyway.

The facts in the case at bar are distinguishable from the cases relied upon by Respondent-Candidate. The aforesaid cases, involved a scenario where a political party was without a candidate and the Court fashioned a way to give voters, enrolled in said party, an opportunity to choose a candidate. Here, Petitioner and Respondent-Candidate are in the same party. Hence, their party will have a candidate irrespective of this proceeding, one way or the other. Notwithstanding same, the other notable and compelling distinction is that the Designating Petition herein is invalidated on substantive grounds, not mere technical grounds.

In *Harden v. Board of Elections*, 74 NY2d 796 (1989), the Court of Appeals, relying on its own precedent in the seminal case *Matter of Hunting v. Power*, 20 NY2d 680 (1967), discussed the use of the opportunity to ballot to permit a candidate to seek office even after their petition was disqualified. The high Court described the circumstances under which an opportunity to ballot remedy was permissible:

> "The 'opportunity to ballot' remedy fashioned in *Matter of Hunting v. Power* (20 NY2d 680) was designed to give effect to the intention manifested by qualified party members to nominate some candidate, where that intention would otherwise be thwarted by the **presence of technical**, but fatal defects in designating petitions, leaving the **political party without** a designated candidate for a given office. (74 NY2d at 797 (emphasis added)."

The Court of Appeals stated that the opportunity to ballot:

> "was not intended to be a generally available substitute for the petition process set forth in article 6 of the Election Law. That legislatively prescribed process ensures that there is a sufficient level of support among party members eligible to vote for the office to justify placing a particular candidate's name on the primary ballot or, in the case of a petition under Election Law §6-164, that there is sufficient voter interest to justify holding a primary election by write-in ballot." *Id.* at 797.

Thus, the Court of Appeals held that "courts should invoke the *Hunting* remedy **only where** the defects which require invalidation of a designating petition are **technical in nature** and do not call into serious question the existence of adequate support among eligible voters." *Ibid.* (emphasis added) (citing *Matter of Quaglia v. Lefever*, 143 AD2d 238, lv denied 72 NY2d 805; *Matter of Santoro v. Kujawa*, 133 AD2d 534, lv denied 70 NY2d 724; *Matter of Hochberg v. D'Apice*, 112 AD2d 1067, affd 65 NY2d 960).

As is the case herein, the aforementioned signatures obtained from persons who were not enrolled in the Democratic Party, is a substantive defect and the opportunity-to-ballot remedy is not available (see, *Bee v. Sabbeth*, 207 A.D.2d 506, 615 N.Y.S.2d 934 [2nd Dept 1994]). Additionally, Election Law §6-132(2) requires that a subscribing witness to a designating petition be an enrolled voter in the same political party as the voters qualified to sign the petition. Failure to be enrolled in the same political party is a substantive requirements of witness eligibility and not an inconsequential violation of the statute. See, *Hochhauser v. Grinblat*, 307 AD2d 1007, 1008, 763 N.Y.S.2d 508 (2d Dept 2003); and *Matter of Staber v. Fidler*, 65 NY2d 529, 534 [1985]).

Where the defect concerns "a matter of prescribed content", it cannot constitute a technical defect, which only goes to "details of form", and "there must be strict compliance with statutory commands as to matters of prescribed content." *Avella v. Johnson*, 142 AD3d 1111, 1112 (2nd Dept 2016) (citing *Matter of Hutson v. Bass*, 54 NY2d 772, 774 [1981]; see *Matter of Stoppenbach v. Sweeney*, 98 NY2d 431, 433 [2002]; *Matter of Alamo v. Black*, 51 NY2d 716, 717 [1980]; *Matter of Rutter v. Coveney*, 38 NY2d 993, 994 [1976]; *Matter of DiSanzo v. Addabbo*, 76 AD3d 655, 656 [2010]; *Matter of Vassos v. New York City Bd. of Elections*, 286 AD2d 463, 464 [2001]; *Matter of DeBerardinis v. Sunderland*, 277 AD2d 187, 188 [2000]).

As is also the case herein, subscribing witness' failure to include the full and or correct date, is a substantive defect and therefore, the opportunity-to-ballot remedy is not available. Election Law §16-130 provides that "a designating petition must set forth in every instance the name of the signer, his or her residence address, town or city (except in the city of New York, the county), and the date when the signature is affixed." Compliance with said statute is required, as it constitutes a matter of substance and not of form. See *Matter of Stoppenbach v. Sweeney*, 98 NY2d 431 (2nd Dept. 2002]; *Avella v. Johnson*, 142 AD3d 1111 (2nd Dept. 2016); and *DiSanzo v. Addabbo*, 76 AD3d 655, 656 (2nd Dept. 2010).

Where there are substantive defects which invalidate a designating petition "the exceptional equitable remedy" of an opportunity to ballot will not lie. *Roberts v. Work*, 109 AD3d 681, 682 [3rd Dept 2013] (quoting *Harden*, 74 NY2d at 798); see also *Griffin*, 131 AD3d 631; *Garrow*, 112 AD2d 1104; *Hunting*, 20 NY2d 680. Accordingly, Respondents' application for such remedy must be denied as a matter of law.

In light of the foregoing, it is hereby

ORDERED, that Petitioner's application for an Order, pursuant to New York State Election Law §§16-100, 16-102 and 16- 116, invalidating the Designating Petition filed with the Rockland County Board of Elections purporting to designate Respondent-Candidate P.T. Thomas as a Democratic

Party candidate for the public office of Member, New York State Assembly, 96th State Assembly District, in connection with the Primary Election scheduled to be conducted on June 25, 2024, is **GRANTED**; and it is further

ORDERED, that the Designating Petition filed with the Rockland County Board of Elections purporting to designate P.T. Thomas as a Democratic Party candidate for the public office of Member, New York State Assembly, 96th State Assembly District, in connection with the Primary Election scheduled to be conducted on June 25, 2024, is declared to be **INVALID**; and it is further

ORDERED, that the Rockland County Board of Elections and the Rockland County Commissioners of Elections, and their respective agents and designees, are **RESTRAINED** and **ENJOINED** from printing the Respondent-Candidate P.T. Thomas' name upon the official ballot(s) of the Democratic Primary scheduled to be conducted on June 25, 2024; and it is further

ORDERED, that any relief sought herein, which has not been expressly granted, is expressly **DENIED**; and

TAKE NOTICE, that any party intending to take an appeal herein is directed to contact the Appellate Division at AD2-election@nycourts.gov immediately upon release of the within Decision & Order. Further, the parties are advised that the Appellate Division, Second Department, has appointed Wednesday, May 8, 2024 as the day for the hearing of appeals pursuant to the Election Law pertaining to the primary elections to be held on June 25, 2024. The Appellate Division, Second Department, has ordered that any such appeals shall be perfected on or before May 1, 2024, and that any responding briefs be served and filed on or before May 6, 2024. Counsel and parties are directed to www.nycourts.gov/courts/ad2 for further information (*see*, ADM 2024-0308).

The foregoing constitutes the Decision & Order of this Court.

Dated: New City, New York
April 26, 2024

E N T E R:

HON. DAVID FRIED, A.J.S.C.
STATE OF NEW YORK
COUNTY OF ROCKLAND