

**Matter of Auerbach v Suffolk County Comm. of the
Conservative Party**

2019 NY Slip Op 30607(U)

March 1, 2019

Supreme Court, Suffolk County

Docket Number: 05320-2018

Judge: David T. Reilly

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**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY**

PRESENT:

HON. DAVID T. REILLY
J.S.C.

_____X
In the Matter of the Application of

Kenneth A Auerbach, as a Conservative Committeeman in Election District 224, Brookhaven Town, New York; Vanessa Morabito, as a Conservative Committeewoman in a Election District 247, Brookhaven Town, New York; Martin E. Hawley, as a Conservative Committeeman in Election District 31, Brookhaven Town, New York; James E. Lupis, as a Conservative Committeeman in Election District 20, Riverhead Town, New York; Joan J. Lupis, as a Conservative Committeewoman in Election District 20, Riverhead Town, New York; Frank Profeta, as a Conservative Committeeman in Election District 82, Brookhaven Town, New York; James D. Ryan, as a Conservative Committeeman in Election District 121, Brookhaven Town, New York; Eugene G. Smith, as a Conservative Committeeman in Election District 213, Brookhaven Town, New York; Patricia A. Smith, as a Conservative Committeewoman in Election District 213, Brookhaven Town, New York,

Petitioners,

-against-

SUFFOLK COUNTY COMMITTEE OF THE CONSERVATIVE PARTY, and the purported EXECUTIVE COMMITTEE OF SUFFOLK COUNTY COMMITTEE OF THE CONSERVATIVE PARTY; Frank A. Tinari, purported Chairman; John E. Flynn, purported First Vice Chairman; Gary Forte, purported Executive Vice Chairman; Brett A. Robinson, purported Operational Vice Chairman; Michael E. Torres,

purported Secretary; John Lorenzo, purported Treasurer; Dennis J. Barravecchio, purported Vice-Chairman at Large; Thomas A. Gargiulo, purported Vice-Chairman at Large; Richard J. Clark, III, purported Vice-Chairman at Large; Tina F. Paris, purported Vice-Chairman at Large; Michael Helfer, purported Vice-Chairman at Large; James J. Kevins, Jr., purported Vice-Chairman at Large; Thomas A. Montiglio, Sr., purported Vice-Chairman at Large; Donald H. Nohs, purported Vice-Chairman at Large; Vincent Puleo; purported Vice-Chairman at Large; Daniel J. Sullivan, purported Vice-Chairman at Large; Michael E. Torres, purported Vice-Chairman at Large; Jeffery M. Bartholomew, purported Vice-Chairman at Large; Richard S. Lanese, purported Vice-Chairman at Large; John A. Careccia, purported Executive Member; William J. Celona, purported Executive Member; John N. Bono, purported Executive Member; Thomas A. Montiglio, Jr., purported Executive Member; Eugene M. Murray, purported Executive Member; John J. Coughlin, purported Executive Member; Dennis P. Bennet, purported Executive Member; Steven F. Behan, purported Executive Member; Christopher Nicolia, purported Executive Member; Michael P. Walsh, purported Executive Member; Patricia A. Walsh, purported Executive Member; Brianna S. Walsh, purported Executive Member; John H. Mulvehill, purported Executive Member; Kenneth G. Dolan, purported Executive Member; Freckerick J. Crockett, purported Executive Member; Edward A. Benz, purported Executive Member; Mark Carros, purported Executive Member; Bronwyn M. Black-Kelly, purported Executive Member; Gregory Grizopoulos, purported Executive Member; Todd Cobe, purported Executive Member; Sheila M. Sullivan, purported Executive Member; Lynn G. Bauers, purported Executive Member; Shawn Springsteen, purported Executive Member; Mark F. Geraci, purported Executive Member; John P. Hnat, purported Executive Member; Joseph Sammartino, purported Executive Member; Robert A. Kevins, purported Executive Member; Dominick D. Verni, purported Executive Member; Joan L. Dinizio, purported Executive Member; Michael A. Poetta, purported Executive Member; Trevor Darrell, purported Executive Member; Robert Macedonio, purported Executive Member; Gregory Mensch, purported Executive Member;

Bryan Browns, purported Executive Member; John Porcha, purported Executive Member; Edward Brown, purported Executive Member; and Cheryl Brown, purported Executive Member,

-and-

Gary Forte, as Chairman of Smithtown Town Conservative Committee; Thomas Montiglio, Sr., as Chairman of the Babylon Town Conservative Committee; John Flynn, as Chairman of Islip Town Conservative Committee; Frank Tinari, as Chairman of Huntington Conservative Committee,

-and-

Anita Katz and Nick Lalota as Commissioners of the Suffolk County Board of Elections, the Suffolk County Board of Elections, the New York State Board of Elections, and the New York State Conservative Party,

Respondents.

For an Order pursuant to Section 16-102 of the Election Law of the State of New York declaring invalid and unlawful the Certificate of Nomination filed by the individual Respondents on or about September 27, 2018 and with the Suffolk County Board of Elections for purported elected party positions within the Suffolk County Conservative Committee, and other relief.

x

This matter was randomly assigned to this Court on October 16, 2018. The proceeding was commenced by Kenneth Auerbach as a member of the Suffolk County Committee of the Conservative Party of New York State ("County Committee") and other similarly situated committee persons by Order to Show Cause dated October 4, 2018 and verified petition of even date. Petitioners seek an Order declaring null and void the purported Certificate(s) of "Nomination" filed at the Suffolk County Board of Elections (the BOE) on September 27, 2018 which sets forth individuals purportedly elected officers of the County Committee at its organizational meeting held on September 26, 2018. In addition, Petitioners seek an Order declaring the purported organizational meeting of the County Committee null, void and of no effect, directing that a new organizational meeting take place and the appointment of a monitor for that new organizational meeting.

A motion to dismiss the petition was filed on behalf of the individually named Respondents, as well as the County Committee and its Executive Committee. The motion sought dismissal of the

petition in its entirety, pursuant to Civil Practice Law and Rules (CPLR) §§ 406, 1001(a), 3013, 3016, 3211(a)(1), (3), (7) and (10) and Election Law §16-102(1). That application was made returnable to the Court, upon agreement by the parties, on February 6, 2019. The Respondents, with the exception of the BOE, also moved by Order to Show Cause for this Court's recusal.

The issues raised in this petition and motion practice arise from the reorganizational meeting of the County Committee held on September 26, 2018.¹ For purposes of simplicity there appears to be two factions seeking to lead the Conservative Party in Suffolk County: the Auerbach faction and the Tinari faction. According to the Return filed by the BOE, "Documents filed by the Conservative Party Respondents in connection with the convention and/or reorganizational meeting held on September 26, 2018" included a document filed by Respondent Michael E. Torres, as the purported Secretary of the Conservative Party Committee, on September 27, 2018 setting forth, pursuant to Election law §§ 2-112 and 2-114, the names and addresses of the officers elected and the rules adopted by the County Committee (the "Certificate of Officers"). According to this document, the Tinari faction's slate of candidates was re-elected as officers and executive committee persons of the County Committee.

On February 6, 2019, the return date of this petition, and after the undersigned sought and received guidance from the Advisory Committee on Judicial Ethics, the Court denied Respondents' application for recusal and reserved decision with respect to Respondents' motion to dismiss. Thereafter, the matter was scheduled for a hearing which commenced on February 8, 2019 and which was completed on February 14, 2019.

THE HEARING

On the first day of the hearing the parties stipulated to the introduction into evidence of the Rules and Regulations of the Suffolk County Committee of the Conservative Party of New York State (the County Rules) (*see* Petitioner's Exhibit 1) and the Brookhaven Town Conservative Party Committee's Rules (the Town Rules) (*see* Petitioner's Exhibit 2). Thereafter, Petitioner Frank Profeta was called to testify.

Mr. Profeta testified that he is the Chairman of the Brookhaven Town Committee of the Conservative Party of New York State (the Brookhaven Committee) and a member of the County Committee. He admitted that the Brookhaven Committee, in either 2016 or 2018, failed to notice its organizational meeting. According to Mr. Profeta, he was unable to reorganize the Brookhaven Committee both in 2016 and 2018 because the Respondent, Frank A. Tinari (the Chairman), as the Chairman of the County Committee, *officio functus*, failed to provide him with the date, time and place of the County Committee's organizational meeting. Mr. Profeta acknowledged that there is no provision in the County Rules that requires the Chairman to provide him with the date, time and place of the meeting ahead of any other committee person. The County Rules, in fact, provide that

¹The County Committee Rules reference an organizational meeting. This Court will use organization or re-organization and their variants interchangeably.

the town committees may be formed at the same time and place as the “County Convention” and immediately following same (*see* Petitioner’s Exhibit 1, Article III, Section 3b, page 7). That rule further provides:

“In the event that a Town Committee does not organize pursuant to these Rules and Regulations noted in this section, the County Committee and the County Executive Committee shall have jurisdiction, pursuant to the Election Law and these Rules” (*see* Petitioner’s Exhibit 1, Article III, Section 3b, page 8).

Prior to the issuance of the notice for the County Committee’s reorganization, Mr. Profeta, as “Chairman” of the Brookhaven Committee, sent a letter on or about September 10, 2018 to the Chairman requesting the date, time and place of the County Committee’s reorganization meeting. According to Mr. Profeta, he spoke with the Chairman on September 16, 2018 who acknowledged receipt of the letter and stated that he would get back to Mr. Profeta. The witness claims the Chairman never called him back, although Mr. Profeta made an additional attempt to reach the Chairman by telephone at his work office. The Court notes that the Town Rules require: “Notice of the time and place of all meetings of the Town Committee must be mailed to each Committeeman not less than five (5) days before such meeting” (*see* Petitioner’s Exhibit 2, Article IV, Section III). The Court accepted Mr. Profeta’s letter to Mr. Tinari in evidence over Respondents’ objection (*see* Petitioner’s Exhibit 3).

Mr. Profeta testified that he attended the County Committee’s organizational meeting on September 26, 2018. He acknowledged that voice votes were taken, including a vote for a slate of officers and the position of Chairman of the County Committee. The witness further indicated that there was no roll-call vote in which the weighted gubernatorial votes could be tabulated.

Petitioner Kenneth A. Auerbach was next called as a witness and testified that he is an elected member of the 2018 County Committee and a member of the Executive Committee of the Brookhaven Committee, and was “united in interest” with the other Petitioners. Mr. Auerbach explained that, prior to the Primary Election in 2018, he undertook to challenge the existing leadership of the County Committee by filing petitions with the BOE to create contests in election districts throughout Suffolk County for the position of member of the County Committee. He claimed to have received overwhelming support and after the Primary Election in 2018 had commitments from a majority of the elected members of the County Committee to effectuate a leadership change.²

On cross-examination Mr. Auerbach testified that there are approximately 1,025 Election

²The Court notes, for purposes of context, that Petitioner Auerbach and Respondent Tinari have previously engaged in litigation concerning leadership of the Suffolk County Conservative Party. The specific matters to which the Court refers are addressed later in this decision and Order.

Districts within Suffolk County. He claims that he was able to contest committee races in two hundred to three hundred election districts. In a number of these races no candidate contested or opposed the Auerbach candidate.

Mr. Auerbach attended the County Committee's organization meeting on September 26, 2018 and testified that approximately 700 to 800 individuals were in attendance. He stated that another individual present recorded the meeting by digital means. Mr. Auerbach reviewed the recording and testified that it was a true and accurate depiction of the meeting. On cross-examination he agreed that the recording did not show all the persons in attendance and that the Pledge of Allegiance, although not shown on the recording, was conducted at the meeting. He also stated that one could hear on the recording everything that was communicated from the microphone on the lectern. Furthermore, the digital recording only showed a couple of dozen people in the room. He agreed that the camera making the digital recording fell off its tripod and that there were short breaks in the recording. The digital recording was admitted into evidence over Respondent's objection (*see* Petitioner's Exhibit 6).

Mr. Auerbach agreed that no steps were taken to physically stop the recording of the meeting or to remove recording equipment from the room, although remarks were made from the lectern that the meeting was not to be recorded. He also testified that he had an additional digital recording of the organization meeting which was sent to him. The Court directed that this recording be shared with Respondents' attorney forthwith.

Petitioner Auerbach testified that he participated throughout the meeting and raised timely and appropriate objections at times. Specifically, he objected to unelected persons being in the meeting room, identifying at least one individual by name, and stated that if he was given a list of the individuals who were appointed committee persons at the meeting, he could identify more people he considered to be "illegally" in attendance.

Mr. Auerbach stated that a motion was made to call the roll and, thereafter, a motion was made to waive the roll call. At this point, Mr. Auerbach claims there was a screaming match on the motion to waive the roll call with the "illegal," non-committee persons attending the meeting participating in the voice vote. There were also derogatory comments made against the Chairman which were recorded. Mr. Auerbach claims that it was his intention to put forth a slate of candidates against the slate offered at the meeting, but declined to do so because he could not obtain an agreement on procedure from the Chairman conducting the meeting. Mr. Auerbach admitted that the Chairman asked him at least once if he was nominating any other candidates.

The parties stipulated into evidence the original sign-in/attendance sheets used at the County Committee's organization meeting (*see* Petitioner's Exhibit 4) and a list of the appointed committee people in the room that night (*see* Petitioners' Exhibit 5). Petitioners' Exhibit 6 was identified by Mr. Auerbach as an audio/visual recording of the meeting which contained breaks in the proceedings. He explained that it is in segments, but stated that it was a fair and accurate record of what took place at the meeting. The Court accepted Petitioners' Exhibit 6 into evidence over

respondents' objection.

On cross-examination Mr. Auerbach agreed there is no directive in the County Rules that requires notice to the Town Chairpersons of the County Committee organization meeting ahead of any regular notice to the elected committee persons. However, Mr. Auerbach urged that Election Law §17-102 which is entitled "**Misdemeanors at, or in connection with, primary elections, caucuses, enrollment in political parties, committees and conventions**" [Emphasis in original] requires same. In addition, Mr. Auerbach noted Election Law §2-104 which states, in pertinent part, that the county committee shall be constituted by the election in each election district of at least two members with a proportional vote based on the votes cast in the last preceding gubernatorial election. Mr. Auerbach, upon further cross-examination, returned to his primary objection to the meeting, that being that the Chairman allowed people in the meeting room who were not elected committee persons and that they illegally participated in the meeting.

Mr. Auerbach agreed that the order of business at all meetings is detailed in the County Rules. With reference to same, Mr. Auerbach believes that the Pledge of Allegiance may have been done, but is not sure if it shown in the digital recording. He agreed that the secretaries of the ten town Conservative Committees of Suffolk County submitted the attendance sheets for their towns. He further agrees that there was a motion on the call of the roll and that the next order of business is the filling of vacancies in the County Committee, followed by the election of officers (*see* Petitioners' Exhibit 1, page 9). Although Mr. Auerbach never calculated whether or not a quorum of 25% was present at the meeting, he could not contest that a quorum was present. He stated that 500 committee persons are needed for a quorum.

Mr. Auerbach later testified that he was unaware of any notice or attendance sheets used for the 2016 organizational meeting of the Brookhaven Committee. He acknowledged that according to the Town Rules, the secretary of the Brookhaven Committee is charged with sending all notices (*see* Petitioners' Exhibit 2, Article III, Section VIII, page 5).

On February 14, 2019, the second day of the hearing, Respondents' attorney, Mr. Vincent J. Messina, Jr., acknowledged that he received the second recording of the County Committee's organizational meeting and had the opportunity to review same. Before resting, Petitioners' requested the opportunity to introduce this second audio/visual recording into evidence. Mr. Auerbach resumed the witness stand and testified that the second recording, marked as Petitioners' Exhibit 7 for identification, was a true and accurate recording of the meeting. He also stated that there were no breaks in the recording, such as those that exist in the first recording, or Petitioners' Exhibit 6 in evidence. After Respondents' *voir dire* and over their objection, the Court accepted the second recording in evidence as Petitioners' Exhibit 7. Petitioners then rested.

Respondents called as their first witness Ms. Bronwyn Black who is enrolled in the Conservative Party and was the elected secretary of the Huntington Town Conservative Party Committee at its 2016 organizational meeting. She testified that on the day of the Conservative Committee's Judicial Convention, that being September 21, 2018, she took pre-stuffed labeled

envelopes to the United States Post Office in Hicksville, NY for mailing to the members of the elected County Committee.³ She stated that these envelopes contained the meeting notice for the County Committee's organizational meeting to be held on September 26, 2018.

Ms. Black testified that she attended the County Committee's organizational meeting and was there for the entire meeting. She stated that she sat on the podium near the lectern because of a severely sprained ankle. Ms. Black estimated that there were 700 to 800 people in attendance. She testified that the room was packed, people were standing all around the room and it was loud and raucous. She stated that there were people near her and behind her that were standing very close together. Ms. Black asserts that the individuals around the video recorder, on her side of the room, were very loud and rude. She could not always hear what was being said from the lectern and when she addressed the assembly to read the slate of officers being nominated, she considered the crowd unruly. She also asserts that people did not follow procedural requests and that derogatory comments were being made against the Chairman from some of the people in the meeting.

Ms. Black estimates that the meeting lasted, from the scheduled start time of 6:30 p.m., approximately three or four hours. She testified that on the evening prior to her testimony, she reviewed the first of the two (2) audio/visual recordings of the meeting (Petitioner's Exhibit 6) and estimated that it recorded approximately 45 minutes to one hour of the meeting. She further described the digital recording as broken into 15 minute segments and not covering the entire meeting. Ms. Black asserts that approximately two hours of the meeting were not on the first recording. When reviewing the recording she was unable to hear her voice when she was speaking from the lectern. Ms. Black noted that there was a physical altercation in the meeting room which was not shown on the recording, but the matter was diffused.

Ms. Black was shown the County Rules in evidence and, more particularly, Article IV as it pertains to the organizational meeting agenda. She testified that the actual meeting followed the order set forth in the County Rules. Ms. Black stated that after filling the vacancies, to which there was no competing slate, the adoption of the rules followed and then the election of officers. She announced the Chairman's slate of candidates for the party officers and executive committee members. Ms. Black then recalls the Chairman requesting of the whole County Committee and Mr. Auerbach if another slate of candidates was being submitted. No competing slate of candidates was offered at the meeting. Finally, she testified that there was a voice vote on the Chairman's slate that he called for the ayes and nays and announced that the slate was elected.

On cross-examination Ms. Black stated for the first time that she was the parliamentarian for the meeting and was there to give advice to the Chairman and others. She was not involved with the scheduling of the meeting. She testified that the start of the meeting was delayed because the sign-in process continued for a lengthy period of time. Ms. Black thinks that bracelets were being handed

³The Court takes judicial notice of the prior proceeding before it, Kaufman v. Poulos, Suffolk County Supreme Court Index No. 005419/2018, where the date of the County Committee's Judicial Convention was established.

out to identify persons who had completed the sign-in process. She cannot identify who was yelling at the meeting, but noted the loudest yelling came from people by the digital recorder nearest to her. Ms. Black acknowledged that during the nominations for officers Mr. Auerbach complained to the Chairman, however, she could not characterize his statements as an objection.

Respondents then called Frank Tinari, the Chairman, as the next witness. The Chairman testified that he has been Chairman of the County Committee for the last three years and Chairman of the Huntington Conservative Committee for thirteen years. He stated that the Brookhaven Committee was not an established committee in 2016 because it did not comply with the County Rules.

The Chairman acknowledged receipt of a hand-delivered letter from Mr. Profeta wherein the author requested to know the date, time and place of the County Committee's organization meeting so that he, Mr. Profeta, could send a meeting notice for the Brookhaven town organization meeting which, according to the County Rules, follows the County Committee meeting. In addition, Mr. Tinari acknowledged that he had a telephone conversation with Mr. Profeta. The Chairman testified as to his recollection of the conversation as follows:

I advised him that Brookhaven was an unorganized town, was not recognized by the County committee and, therefore, he was not recognized as the Chairman of Brookhaven Town (*see* Transcript of Hearing, Page 213, Lines 21-23).

The Chairman then explained that the County Committee has an account with the BOE which it used to obtain mailing labels for the 2018 elected conservative committee persons. He stated that because of the number of contested committee races, it took some time for the BOE to certify the list from which the mailing labels would be generated.

The Chairman stated that he asked Mr. John Flynn, the First Vice-Chairman, to secure a meeting place for approximately 500 to 800 people. He also asked Mr. Flynn to arrange for security to be present at the meeting to keep order. He anticipated that the organizational meeting would be contested because the meeting in 2016 was very contentious.

The Chairman said he only reviewed the first digital recording of the meeting, Petitioners' Exhibit 6, and indicated that it contained sections of the meeting, but that it was not a complete recording of that event. For example, he said that the Pledge of Allegiance and the invocation occurred, but were not shown. He stated the first recording was approximately 45 to 50 minutes and that the meeting was actually much longer. Mr. Tinari acknowledged that he conducted the meeting and that there was a motion to fill vacancies which was seconded and voted on by voice vote. There was no competing slate offered to fill the vacancies in the committee although he recalled asking: "[I]s there a motion for another slate of candidates?" (*see* Transcript of Hearing, Page 225, Lines 4 - 5). Notwithstanding the noise and yelling at the meeting, the Chairman stated that he was able to hear his voice in the digital recording (Petitioners' Exhibit 6).

When asked about the conditions of the meeting the Chairman responded that all the seats were occupied and that people were standing in the back of the room. He stated that security personnel were hired at a cost of \$250.00 each. He acknowledged there were groups of people on the podium and explained that Ms. Black was there because she was wearing a boot cast on her foot. Mr. Tinari testified that the meeting was noisy and raucous and he heard people in the room stating that they could not hear him. He indicated that people were yelling at one another, he saw an incident in the back of the room and ten of the security personnel respond to that incident.

The Chairman testified that at the meeting a slate of officers was elected, but not before he invited other nominations or another competing slate on at least four occasions. No other slate was offered and the Chairman stated that he specifically asked Petitioner Auerbach if he had an alternative slate to offer.

On cross-examination the Chairman stated that the room was arranged with 600 chairs and more were added once it became apparent that the attendance was going to be larger than planned. He said that the date for the County Committee's organization meeting was selected approximately one week before the mailing was sent.⁴ He acknowledged that after the County Committee meeting the Towns of Huntington, Babylon, Smithtown and Islip held their own organization meetings. In addition, prior to the County Committee meeting, the chairpersons of the individual town committees were told of the meeting date and sent their own meeting notices.

The Chairman explained that Mr. Torres and Mr. Flynn organized the process for persons at the meeting to sign-in as attendance sheets were prepared according to town and listed all of the elected committee persons with their gubernatorial vote count. He believed there was also a sign-in sheet that listed the people that were going to be filling the vacancies in the County Committee, but he was not aware if these persons noted their attendance for the meeting in the same manner as the elected committee people. He is aware that the people who signed in and who were not elected committee members were allowed in the meeting room. Those in attendance were apparently issued a bracelet, but there was only one color of bracelet issued at the meeting. The Chairman believes that the meeting started around 7:00 p.m. There was no roll-call vote at the meeting and he never directed a roll-call vote on any matter before the committee. More specifically, he felt that a roll-call was not warranted when there was no competing slate of officers. Mr. Tinari further indicated that there was never a tabulation of gubernatorial votes.

Christopher Nicolia was the next witness to testify on behalf of the Respondents. He is an officer of the Islip Town Conservative Committee and attended the County Committee's organizational meeting. He estimated that the meeting was conducted over a period of two hours. Mr. Nicolia testified about the conditions at and during the meeting similar to the testimony offered by Ms. Black and Mr. Tinari. After Mr. Nicolia completed his testimony the Respondents rested.

⁴ The Court takes judicial notice of the calendar and finds that the meeting date was set on and around September 14, 2018 or earlier.

Petitioners then called Mr. Profeta as a rebuttal witness. Petitioners' attorney made an offer of proof that Mr. Profeta had a recording of his September 16, 2018 telephone conversation with Mr. Tinari and that it would reveal that the Chairman's recollection of this conversation was faulty and inaccurate. After allowing Respondents the opportunity to hear and review the recording and over their objection, Mr. Profeta resumed the witness stand. He testified that he had a true and accurate recording of his telephone conversation with the Chairman which was secured through a software application on his mobile phone. The recording was deemed marked for purposes of identification as Petitioners' Exhibit 8, admitted into evidence over Respondents' objection and then played. The recording revealed that the Chairman's testimony concerning his telephone conversation with Mr. Profeta was not accurate and not true, particularly with respect to Mr. Profeta's status as a town chairman.

RESPONDENTS' MOTION TO DISMISS

Respondents claim that Petitioners failed to join, as necessary parties, certain individuals at the organization meeting who were purportedly elected by the County Committee to fill vacant committee positions. There were at least 132 non-committee members who signed sheets memorializing their attendance at the County Committee meeting.⁵

In *Saratoga County Chamber of Commerce, Inc. v Pataki* (100 NY2d 801, 821, 766 NYS2d 654 [2003]), the Court of Appeals reiterated the policy implicit in CPLR 1001 that dismissal should be the last resort. The Court of Appeals stated in *Saratoga*:

“The statute [CPLR §1001] directs that persons must be brought into the action when joinder is necessary to accord ‘complete relief’ between the parties, or when the interests of the person might be ‘inequitably affected by a judgment in the action’” (*see Id.*, at 819).

Additionally, the Court of Appeals set forth the principal purposes of requiring dismissal owing to the absence of an indispensable party. That Court stated,

“First, mandatory joinder prevents multiple, inconsistent judgments relating to the same controversy. Second, joinder protects the otherwise absent parties who would be ‘embarrassed by judgments purporting to bind their rights or interests where they have no opportunity to be heard’.” (*Id.*, at 820).

The essence of the instant matter focuses on the propriety and conduct of the organization meeting by its Chairman and his failure to protect the voting rights of the properly elected committee

⁵By letter to the Court dated February 25, 2019 and copied to Mr. Vincent J. Messina, Jr., counsel for the Petitioners maintains that the total number of such non-committee members was actually 168. By letter to the Court on February 26, 2019, Mr. Messina contests whether these individuals were in the meeting room at any time relevant to this proceeding.

persons pursuant to Election Law § 2-118. It has been urged by Petitioners that non-members participated in the meeting and even voted on their own election to be a committee person. Petitioners' challenge here is to the procedural aspects of the meeting during which they claim there were irregularities such as to render impossible a true determination as to who rightfully was nominated or elected.

Petitioner does not have another effective remedy should this proceeding be dismissed. While every committee person, both elected and purportedly appointed, may have an interest in this matter, there is no real or significant prejudice to the alleged non-joined parties. If the meeting is upheld by this Court the appointed committee persons will continue to serve and, if the meeting is declared null and void, a new meeting will be held where the filling of vacancies will be undertaken in accordance with the Election Law and the County Rules. Each of the factions of the County Committee, as well as the non-members purportedly elected at the meeting, are well represented by Petitioners and Respondents and an effective judgment may be rendered in the absence of the non-joined parties.

In *Borelli v. Meier* (264 AD2d 479, 694 NYS2d [2d Dept 1999]), a slate of candidates aligned with the petitioner was elected at a meeting to the county committee. Subsequently, at a later convention, the prior election was invalidated and a rival slate of candidates was elected. The Appellate Court noted, "[T]his proceeding is rooted in a controversy as to which of two opposing slates of candidates for membership in the Westchester County Committee from Ward 2 ... had been duly elected at a meeting ... " Petitioners, however, failed to join the rival slate of candidates and the Court found they were necessary parties and dismissed the proceeding. Unlike the circumstances presented here, there is no indication in *Borelli* that the new slate of committee members elected at the second meeting participated in the vote for their own election, nor participated in the vote to remove the first slate.

Here, as the Court will more thoroughly demonstrate later in this decision and Order, the participation of invited, non-elected members of the Conservative Party in the voting at the County Committee meeting is a violation of the Election Law (*see* Election Law §2-118) and a usurpation of the rights of each properly elected committee person at the meeting. These non-joined parties should have no right to leverage their intrusion on the rights of the elected committee persons present to become necessary parties to this special proceeding. In this special proceeding, the rooted controversy is a challenge to the manner in which the Chairman conducted the meeting and his allowing non-committee members to be seated, remain and participate at the organizational meeting prior to and when the Chairman called a voice vote over objections to fill the vacancies and after the purported filling of same.

In addition to the foregoing, the court in *Brayman v Stevens* (54 Misc. 2d 974, 283 NYS2d 933 [Sup Ct, Dutchess Cty, 1967]; *aff'd* 28 AD2d 1090, 285 NYS2d 280 [2d Dept 1967]; *aff'd* 20 NY2d 868, 285 NYS2d 97 [1967], which was cited favorably in *Mazur v Kelly* (170 AD2d 1037, 566 NYS2d 180 [4th Dept 1991]), stated,

To require the petitioner to have joined all candidates who might be similarly situated

would be to impose an impossible, unrealistic and insurmountable burden upon the petitioner. The legal status of the other candidates may possibly be affected by the within disposition, but their nominations are not attacked and are not part of the present proceeding.

Here, there can be no real argument that it would have been unrealistic to have the Petitioners ascertain the name and address of each of the members elected to fill vacancies at the meeting on September 26, 2018 to join them as parties to this action, if not outright impossible within the time frames necessary for purposes of instituting this proceeding.

That being said, even if the non-committee members should be considered necessary parties, this Court finds that dismissal is still not required pursuant to CPLR 1001(b). The Court is fully aware of the distinction made in the statute with respect to a necessary party subject to the jurisdiction of the court and one over whom jurisdiction can be obtained only by consent or appearance (*see Red Hook/Gowanus Chamber of Commerce v N.Y. City Bd. Of Stds. & Appeals*, 5 NY3d 452, 805 NYS 525 [2005]). The Court is further aware of the fact that this proceeding had to have been commenced within the ten day time limit dictated by Election Law §16-102(2). However, to force the Petitioners to identify each and every member of the Conservative Party purportedly elected as committee people at the September 26, 2018 organizational meeting, secure each of their addresses and take every procedural step in terms of service to name each of these individuals as individual respondents, would bear an unreasonable burden upon the Petitioners.⁶ Therefore, jurisdiction could seemingly only have been established over these individuals by consent or appearance and, accordingly, the Court must apply the dictates of CPLR 1001(b).

That statute provides that when a person who should be joined under subdivision (a) has not been made a party, the court, when justice requires, may allow the action to proceed without his being made a party. In determining whether to allow the action to proceed, the court is required to consider factors including, “(1) whether the plaintiff has another effective remedy in case the action is dismissed on account of nonjoinder; (2) the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined; (3) whether and by whom prejudice might have been avoided or may in the future be avoided; (4) the feasibility of a protective provision by order of the court or in the judgment; and (5) whether the effective judgment may be rendered in the absence of the person who is not joined.” Of the five factors in the statute, no single one is determinative; and while the court need not separately set forth its reasoning as to each factor, the statute directs the court to consider all five (*see Id.*, at 459).

As the Court noted earlier, the Petitioners in this matter have no other form of recourse should this matter be dismissed. Second, the Court has similarly already addressed the possible prejudice which may accrue from the nonjoinder of these committee persons and determined that

⁶Although the Petitioners could have designated these individuals as “John Does” or “Jane Does” and seek substitution by CPLR 1024, the Court finds this procedure to place form over substance.

little, or no prejudice, would attach. With respect to the avoidance of prejudice in the future, the Court only notes that a list of individuals who were elected at the 2018 County Committee meeting, with mailing address labels similar to those generated by the BOE, could have been provided to Petitioners to avoid this very issue. Next, the Court finds that a protective provision by Order of the Court is not a necessary factor to be considered in this analysis. Finally, the Court is confident that the interests of the nonjoined parties were effectively represented at the hearing of this matter such that a judgment may be entered in the absence of these nonjoined members. In making these determinations the Court has balanced as appropriate each of the factors as required by the instant proceeding's unique circumstances (*see Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 766 NYS2d 654 [2003]).

Based upon the sum of the foregoing, that branch of the Respondent's application seeking dismissal for failure to join necessary parties is denied.

Respondents further urge that the petition should be dismissed because Petitioners lack standing and claim none of the Petitioners satisfy the criteria to commence this proceeding as set forth in the Election Law §16-102(1). That statute allows a proceeding to be instituted by any aggrieved candidate, or by the chairman of any party committee or by a person who shall have filed objections, as provided for in that chapter. It is not contested that Petitioners are all newly elected committee persons of the County Committee. However, the parties to this proceeding dispute if any of the Petitioners are also a party chairman or if an individual committee person has standing.

With respect to the issue of standing, this Court is guided by *Matter of Klein v Garfinkle* (12 AD3d 604, 786 NYS2d 77 [2d Dept 2004]). In that proceeding, pursuant to Election Law §16-102, to invalidate the organizational meeting of the Working Families Party County Committee of Suffolk County, the court determined that "members of the County Committee have standing to challenge the manner in which vacancies on the County Committee were filled at the organizational meeting" (*see Id.*, at 605, *citing Matter of Mazur v Kelly*, 170 AD2d 1037, 566 NYS2d 180 [4th Dept 1991]). Here, the Court finds that the Petitioners are similarly situated to the members of the County Committee in *Matter of Klein* and, concomitantly, determines that the Petitioners have standing sufficient to maintain this proceeding.

In addition to the foregoing, at the September 26, 2018 meeting, prior to the election of officers, the Chairman allowed non-members into the meeting room and did nothing to quell their ability to participate and vote for their own appointments. The County Committee's vacancies were filled by a voice vote which is allowed by the Committee Rules, but only after the Chairman denied the requests for a roll call. At the time of the election of officers, Mr. Auerbach announced that he was prepared to put forward a slate of candidates, albeit only if the Chairman would allow a roll-call vote and not allow the then non-elected members present to participate. The Chairman did not respond to the inquiry. Finally, Mr. Auerbach's name was put forward in a motion to suspend the County Rules and elect him "Chairman."

It is clear to this Court that as leader of the opposition to the Chairman's slate of candidates,

Mr. Auerbach was a candidate and was aggrieved by the unjust processes employed by the Chairman to avoid the roll-call vote and the necessary tabulation of gubernatorial votes. The Election Law does not define an aggrieved candidate, but under the unique facts of this case and the liberal mandate of Election Law §16-100(1), the Court finds that Petitioner Auerbach has standing as an aggrieved candidate to bring this proceeding. Although courts have declined to interfere in the internal affairs of political parties, they will act to protect the rights of the members of the county committee to be present and to vote at committee meetings (see *Leirer v. Suffolk County Committee of Conservative Party*, 94 AD2d 797, 462 NYS2d 910 [2d Dept 1983]). Accordingly, that branch of the Respondents' motion to dismiss the proceeding based upon the Petitioners' lack of standing is denied.

Respondents have also sought dismissal of this proceeding arguing that the petition lacks specificity, the Petitioners fail to state a cause of action, and that the allegations of fraud are not pled with the required specificity. In this case, Petitioners have set forth sufficient facts that irregularities, discrepancies or errors occurred at the County Committee's organization meeting (see generally *Matter of Gregg v. Fisselbrand*, 22 AD2d 342, 345-346, 256 NYS2d 160 [4th Dept 1965] such that, upon a liberal reading of the petition and giving the Petitioners every favorable inference, the petition states a cognizable cause of action (see *In re Simon v Board of Elections*, 222 AD2d 511, 635 NYS2d 529 [2d Dept. 1995]). Although the Court finds that the Petitioners have failed to offer sufficient claims of fraud on the part of Respondents, the claims survive based upon the irregularities, discrepancies and errors alleged. Accordingly, that branch of the Respondents' application to dismiss the proceeding upon the various grounds enumerated in CPLR 3211 is denied.

FINDINGS OF FACT

This Court concludes that there are virtually no contested facts in this proceeding. The parties presented testimony concerning the County Committee's organizational meeting and little, if anything, is in actual conflict. It is the legal effect of the actions of the parties that forms the controversy before this Court. In addition to the witnesses' testimony, the Court has reviewed and considered the two (2) digital recordings of the meeting (see Petitioners' Exhibits 6 and 7). It is clear that the first recording contains only portions of the meeting while the second recording is more comprehensive in scope. Petitioners' Exhibit 7 substantially, if not entirely, records the meeting from beginning to end and provides a fair and accurate audio and visual representation of the meeting. The focus of both recordings is on the lectern and portions of the podium and provides limited visualization of the assembled crowd. The first recording is taken from the left side of the room when one looks at the podium and the second recording is from the right side of the room. Neither party submitted any evidence discrediting what was in fact recorded or provided sufficient evidence that substantial material matters were omitted from the recordings. The Court has considered that the sound around the recording devices may not be identical, but accepts that the recordings provide the Court with two separate perspectives of the meeting. No minutes of the meeting were submitted to the Court for review and consideration.

Upon review of the facts, the Court has taken into consideration the credibility and

truthfulness of the witnesses. Generally, the Court found that Petitioners' witnesses' testimony fair and credible; likewise the Court found the Respondents' witnesses' testimony fair and credible, except for portions of that of Mr. Tinari. The Chairman's testimony was truthful in many respects, but with reference to the September 16, 2018 telephone conversation, he testified to a conversation with Mr. Profeta which was made up from "whole cloth." The Chairman's testimony was an attempt to undermine Mr. Profeta's claim that he was a party chairman and intended to suggest that his status, in his own mind, as a town chairman was not genuine. Although this Court finds that Mr. Profeta was, in fact, not a party chairman due to the failure of the party to properly organize in 2016, the Chairman manufactured testimony to advance Respondents' claims. This falsehood calls into question his discretionary judgments made at the organizational meeting.

The Court finds that the notice of the meeting was properly mailed at the direction of the Chairman. The Court makes this finding based upon the sworn statement filed by Michael E. Torres with the Suffolk County Board of Elections and testimony adduced at trial. According to the Committee Rules, the Chairman is charged with sending the meeting notice, but has the authority to delegate these duties. Based upon Ms. Black's testimony, the meeting notice was sent on September 21, 2018 from a post office in Nassau County, NY. The Court notes that Mr. Torres failed to set forth the date or time of mailing in his sworn statement filed with the Board of Elections.

According to Mr. Torres' affidavit, in addition to sending the meeting notice to elected committee persons, he also sent the notice to non-elected persons: "...those Members of the Committee who held such position by virtue of ties at the election which were determined in accordance with the rules of the Committee" (*see* Court Exhibit V, Notice of Motion to Dismiss, Torres' Affidavit, paragraph 5). Mr. Torres does not reference which rule of the County Conservative Party requires or authorizes a meeting notice to be sent to non-elected persons. However, the Court finds that the sending of this notice to non-committee persons does not, in and of itself, invalidate the meeting notice.

The Chairman set the date for the meeting after its location was secured. He advised the chairmen of the Town Committees that were previously organized in 2016 before the meeting notice was mailed. In this way, the Town Chairmen were able to mail their own meeting notices for their town organizational meetings. The Chairman did not advise Mr. Profeta of the date, time and place of the meeting when they had their first and only telephone conversation concerning same. Nor did the Chairman explain to Mr. Profeta that he was not the Chairman of the Brookhaven Conservative Town Committee.

Prior to the meeting, the Chairman hired a security force to be in attendance at the meeting. He seemingly determined that at the 2016 organization meeting there was sufficient acrimony to necessitate a security presence for the 2018 meeting. It is unknown how large the Chairman's security force was, but it is clear they were present at the meeting. Furthermore, there was no testimony that the security personnel wore any identifying uniform, sign, or badge to differentiate them from the assembled elected committee persons. Nor was the Court advised of any instructions given to security to refrain from participating in the meeting. Lastly, it was alarming and chilling

that persons other than the Chairman took to the lectern and called for the security present to challenge those persons who were digitally recording the meeting. There is no Committee Rule that prohibits this conduct, although the Court finds it not unreasonable for the Chairman to request, on behalf of assembled body, that no recordings be made. It is up to the body to make any final determination on this matter. Given the fact that there was no temporary secretary to record the minutes of the meeting, these digital recordings are an important source of information to the Court.

Check-in for the meeting began at or about 6:00 p.m. and because of the large number of people in attendance, the start of the meeting was delayed until approximately 7:00 p.m. Tables were arranged according to town for the elected committee members to sign-in. There are at least 132 instances, with more alleged, where non-committee members were allowed to sign-in and attend the meeting. In addition, a single colored bracelet was issued at the meeting, but there was insufficient testimony to establish who received this identification, what it was used for or if it was employed in any meaningful way. It is clear that the Chairman did not rely on the bracelets for any significant purpose.

The Chairman presided over and opened the meeting in accordance with Committee Rules (*see* Petitioner's Exhibit 1, Article IV, Section I, page 9). He is the only officer of the outgoing committee who has a prescribed role in the organizational meeting of the newly elected committee. There were no other temporary officers appointed or elected at the meeting. There was no announcement by the Chairman of his appointment of Ms. Black as parliamentarian for the meeting. This may explain Ms. Black's initial reluctance to state that she sat on the podium for that purpose. Likewise, there was no temporary secretary, credential committee, tellers or Sergeants-at-Arms appointed from the body or otherwise elected.

The parties all agree that the Pledge of Allegiance and invocation were conducted and the Court finds that, at this time and immediately thereafter, the elected committee persons and unelected persons assembled were attentive and were acting in an orderly manner. A short time later, the Chairman asked that the attendance sheets be brought to Michael Torres. Thereafter, Mr. Torres advised the Chairman that a quorum was present and then the Chairman called for a motion to approve and ratify the official meeting notice.

A motion to approve the meeting notice was made and seconded, although the meeting notice was never read to the body, nor evidence of the mailing provided to the County Committee. Thereafter, an objection to the meeting notice was made because, *inter alia*, it was not received by many committee members. The Chairman considered the objection a motion and summarily denied same claiming that "we" have the proof of mailing. Again, however, this evidence was not shared with the assembled elected committee members. Prior to the Chairman taking a voice vote, calling for the ayes and nays on the motion to approve the meeting notice, a request for a roll-call vote was made. The Chairman called for the voice vote and he declared that the motion was approved by the County Committee.

Prior to the Chairman announcing the next matter of business, there were further calls for a roll-call vote and at least one point of order was made which was not recognized by the Chairman. The Chairman called for a motion to dispense with the call of the roll claiming the quorum was established in writing. The Chairman announced that there was a motion to call the roll to establish attendance and then called for a second which was made. The motion which was now before the body was ignored by the Chairman and he called for another motion to dispense with the call of the roll. Another voice vote was taken, not on the motion to call the roll, but rather, the second motion to dispense with the call of the roll. According to the Chairman, this measure was approved.

At this point in the meeting the Chairman moved to the next order of business -- the filling of vacancies in the committee. Petitioner Auerbach, on a point of order, objected to the filling of vacancies citing recent decisions from the Appellate Division, Second Department and stating that there should be no filling of vacancies until there is a call of the roll of the elected committee members by gubernatorial vote. The Chairman considered the objection a motion and summarily denied same. Thereafter, a long list of individual names without addresses to fill the vacancies was read aloud to the County Committee and others present. After further objections and requests for points of order, a voice vote to fill the vacancies in the committee by the slate announced was taken and the Chairman declared that the motion was approved.

The next order of business was a motion to adopt the rules for the County Committee and the Chairman called for another voice vote after which he declared the motion passed. Next, the election of officers was announced by the Chairman and Ms. Black read a slate of officers which included the Chairman himself for re-election. The Chairman then entertained a question of privilege which was a motion to suspend the rules and to elect Kenneth Auerbach as Chairman; the Chairman of the meeting again summarily denied the motion.

On many occasions the Chairman asked Mr. Auerbach if he was putting up a slate of candidates, but according to this Court's review of the digital audio/visual recording he never asked the County Committee members if they had any other nominations. Mr. Auerbach responded that he had a slate of candidates, but would not offer their names unless the Chairman would represent that there would be a roll-call vote, counting the gubernatorial votes of only the elected committee people (not the persons appointed at the meeting). The Chairman did not respond to the question and, after allowing Mr. Auerbach the opportunity to make a record, called for a motion to elect the slate of officers and executive committee members. The vote was taken by voice vote, the Chairman called for ayes and nays and announced that the slate was elected. Thereafter, the Chairman continued through the remaining order of business, calling for voice votes and ultimately the meeting was adjourned *sein die*.

CONCLUSIONS OF LAW

The Court's jurisdiction to intervene in election matters is limited to the powers expressly conferred by statute (*Matter of Scaringe v. Ackerman*, 119 AD2d 327, 506 NYS2d 918 [3d Dept. 1986]) and the statutory limits of the Court's jurisdiction shall be liberally construed (*see* Election

Law § 16-101(1). Election Law §16-102(1) confers upon the Supreme Court jurisdiction over proceedings to contest the election of any person to a party position. In addition, the law requires that a proceeding with respect to a meeting of a party committee must be commenced within a specified time period (*see* Election Law § 16-102(2)).

The internal affairs of political parties may be regulated by the State; they are private associations with public and quasi-official status and at the very least quasi-governmental function in the electoral process (*Davis v. Sullivan County Democratic Committee*, 43 NY2d 964, 404 NYS2d 549 [1978]). “The New York State Legislature has structured the Election Law to permit political parties, within limits fixed by law, to conduct their own affairs without judicial supervision or restraint. Judicial intervention is only warranted upon a clear showing that a party or its leaders have violated the Election Law or the party’s own rules adopted in accordance with law, or otherwise violating the rights of party members or the electorate” (*Harding v. Harrington*, 127 Misc.2d 5, 484 NYS2d 571 [Sup Ct, New York Cty, 1984]; *aff’d* (104 AD2d 544, 479 NYS2d 480 [1st Dept. 1984]; *appeal denied* (63 NY2d 606 [1984])). Although courts have declined to interfere in the internal affairs of the State’s political parties, they will act to protect the rights of committee persons to be present and to vote at meetings of the committee (*Leirer v. Suffolk County Committee of Conservative Party of New York State*, 94 AD2d 797, 462 NYS2d 910 [2d Dept. 1983]).

The Court may direct a new meeting of a party committee where it finds that there has been such fraud or irregularity as to render impossible a determination as to who rightfully was nominated or elected (*see* Election Law § 16-102(3)). The Court of Appeals stated the rational standard to be used when it considered results in a primary election in *Ippolito v. Power* (22 NY2d 594, 294 NYS2d 209 [1968]) as follows: “If irregularities are sufficiently large in number to establish the probability that the result would be changed by a shift in or invalidation of, the questioned votes, there should be a new election.”

The Court of Appeals explained:

While it is troubling to require new election for irregularities without evidence of fraud or other intentional misconduct, ignoring such irregularities would undoubtedly create the likelihood that skillfully manipulated ‘irregularities’ would be used to mask corrupt practices. It is better to keep the standards high, even at the cost of penalizing some voters and candidates for the failures of election inspectors, than to increase the opportunities for fraud without possibility or likelihood of discovery. And the statute is explicit in directing that irregularities, as well as fraud, may justify the direction of a new election (*Id.*, at 598).

The Court finds that the standards and principles set forth by the Court of Appeals in *Ippolito* are applicable to a party’s organizational meeting and the election of its officers as the same opportunity for mischief abounds at the party organizational level, with the concomitant ill effects felt upon the disenfranchised.

The Petitioners claim Respondents violated Election Law §17-102 by failing to give Mr. Profeta sufficient notice of the organization meeting so as to allow the Brookhaven Town Committee to reorganize. This Court finds that the provisions of Election Law §17-102 apply to this County Committee meeting as Article 17 of the Election law applies to primary elections (*see* Election Law § 17-100(1)). A primary election is defined as “the mandated election at which enrolled members of the party may vote for the purpose of nominating party candidates and electing party officers (*see* Election Law §1-104[9]). Specifically, Petitioners claim that the Chairman’s failure to provide Mr. Profeta with reasonable advance notice of the County Committee meeting was a violation of Election Law §17-102(5) and (7). The Court, however, finds that the facts and circumstances of this case do not support Petitioners’ claim of violations of this statute.

The Brookhaven Committee did not organize after the 2016 primary election, therefore, in accordance with the County Rules it fell under the jurisdiction of the County Committee. Therefore, before the 2018 Primary Election the Brookhaven Committee was *not* organized and could not organize without approval of a yet to be elected County Executive Committee or perhaps by a resolution voted by the County Committee at its organizational meeting under “new business.” Since in 2018 there was no Brookhaven Committee, it could not have a chairman. In 2018 Mr. Profeta was a county committee person, but had no authority to send a meeting notice or make such a request of the Chairman for prior notice of the meeting date. Accordingly, there was no violation of Election Law § 17-102(5) or (7).

With respect to other objections raised about meeting notice and on the totality of the evidence produced at the hearing, the Court finds there was sufficient notice. Although the mailing at some unknown time of the meeting notice from Nassau County, NY to elected members of the 2018 County Committee and others, with a Sunday included within the five days notice required by the rules, may not be the best notice it was, nevertheless, adequate notice under the County Rules (*see* Petitioner’s Exhibit 1, Article IV, Section 3, page 10).

Petitioners’ next contention is that the participation of persons other than elected committee members tainted the County Committee’s organizational meeting such that it should be declared null and void pursuant to Election Law §16-102(3). Petitioners claim that prior case law provides that Election Law §2-118 mandates that any vacancies in the County Committee at its organizational meeting must only be filled by the committee members duly elected at the primary election immediately preceding its organizational meeting. Petitioners cite two recent cases for this authority, *Matter of Brocato v. Tinari* (157 AD3d 782, 69 NYS3d 347 [2d Dept. 2018]) and *Matter of Auerbach v. Suffolk County Committee of the Conservative Party* (159 AD3d 695, 72 NYS3d 131 [2d Dept. 2018]).

In *Brocato* new members of the County Committee were elected at the 2016 Primary Election, but there remained vacancies in the County Committee due to tie votes or no votes in contested election districts. The 2014 Executive Committee of the 2014 County Committee attempted to fill these vacancies prior to the party’s 2016 County Committee organizational meeting. The Appellate Division held:

The filling of vacancies in a political party's county committee is governed by Election Law § 2-118 which provides, in pertinent part, that, in the case of a failure to elect a member of the committee, the vacancy created thereby shall be filled by the remaining members of the committee (*see Matter of Brocato v Tinari*, at 784).

The Appellate Court found that the County Committee Rules were consistent with Election Law §2-118 which provides in certain circumstances the filling of vacancies by the Executive Committee and noted further:

However, to allow the 2014 Executive Committee to rely on this exception so as to fill vacancies during the period after the primary election in 2016 and before the mandated organizational meeting violates the express terms of Election Law § 2-118 (*see Matter of Donnelly v Curcio*, 284 AD2d 460, 460-461, 726 NYS2d 703 [2001]), improperly allows the exception to swallow the general rule, which only permits the remaining members of the County Committee to fill such vacancies, undermines the election results of the 2016 primary election and is inconsistent with the case law limiting the authority of the 2014 Executive Committee during the period after the primary election and before the organizational meeting (*see Matter of Brocato v Tinari*, at 785).

Similarly, in *Auerbach*, the Appellate Court held that only the newly elected County Committee had the authority to fill the subject vacancies. Neither the *Brocato* nor the *Auerbach* cases discuss the manner in which vacancies are filled at the organizational meeting. That issue is squarely before this Court. Petitioners argue that by inviting non-members to attend the County Committee's organizational meeting and by allowing them to be seated and participate in the meeting, and their own election, the Chairman and his agents, perverted the voting process by allowing persons other than the elected committee members to participate in the vote to fill vacancies in the committee.

The fact that non-elected persons were present at the meeting is unchallenged. There is no evidence that these non-committee members were instructed to remain silent because they had no right to participate in the meeting until they were voted in by the elected members of the County Committee.⁷ There is no evidence that these same persons were sequestered within the meeting

⁷ This procedure is compared to prior meetings of the County Committee. In reviewing the meeting minutes of the 2000 County Committee's organizational meeting in the *Donnelly v Curcio* Record on Appeal there was some effort made to control the persons seated at that meeting who were not elected committee members. They were given a special instruction to not participate in the voice vote for their own election. The Record on Appeal provides,

Mr. Kay [the presiding officer] then announced that the Chairman was asking that those people who had been put in to fill vacancies (not elected on Primary Day) not vote on a motion to ratify the Chairman's filling of vacancies which also included the filling of vacancies in the Towns of Islip and Smithtown.

room so that any attempted participation could be monitored and preempted by the Chairman. Indeed, all parties agree that the meeting became loud and raucous. During this confusion when members were objecting to the motion being made and attempting to raise points of order and personal privilege, the motion to waive the call of the roll was seconded. It was clear that at this juncture a request for a roll-call vote on the motion was made by more than one person attending the meeting. This request was ignored by the Chairman or ruled out-of-order by him.

At this meeting the Chairman entertained only voice votes for all business brought before the County Committee. He made no efforts to preserve the integrity of that voting process and permitted non-members to participate in the voice-votes for several matters, including their own appointment/election to fill the vacancies. This irregularity makes it impossible for the Chairman, this Court or anyone for that matter to determine who was rightfully elected at the meeting. This procedural determination can be contrasted by the facts and circumstances presented in *Dinowitz v Rivera* (22 Misc3d 1108(A), 880 NYS2d 223 [Sup Ct, Bronx Cty. 2008]) where the court was faced with a similar situation and contrasted two competing party meetings. The court stated,

Credible testimony established that not only was the room dimly lit, but County Committee members and members of the public were seated together. Under those circumstances, the failure to differentiate these individuals from each other by requesting that voting members stand, or those with wristbands raise their arms, for the purpose of determining the existence of a quorum, was not reasonable...

In conducting the organizational meeting, Heastie differentiated voting members from non-voting guests by asking voting members to stand and display their yellow wristbands each time an officer was elected" (*see Id.*).

The Court in *Dinowitz* found that petitioner Heastie acted in a manner to safeguard and not abridge the voting rights of the county committee members.

Petitioners also urge that by employing voice voting at the County Committee organizational meeting the Chairman violated Election Law § 2-104(1) which provides, in part, that each member of the committee shall have a proportional vote of one half of the gubernatorial votes cast at the last gubernatorial election in the election district from which they were elected. Petitioners cite *Davis v. Sullivan County Democratic Committee* (43 NY2d 964, 404NYS2d 549 [1978]) which affirmed the Appellate Division determination that struck the defendant committee's rules that required weighted voting on nominations, but not internal party matters.

Respondents cite the more recent case of *Donnelly v Curcio* (*supra*). Similar to the case at bar, the *Donnelly* matter involved an organizational meeting of the Suffolk County Committee of the Conservative Party of the State of New York. At that meeting the order of business included, *inter alia*, the filling of vacancies and election of officers. The Appellate Division, in reversing the order and judgment of the Supreme Court which invalidated the certificate of election filed after the

meeting, held:

Accordingly, it was proper for the chairperson of the of the convention to utilize a voice vote, as permitted by Article IV, Section 5 of the Committee Rules and Regulations (hereinafter the Rules). We further note that the Rules require a roll-call vote only if such a vote is demanded by individuals in attendance who are entitled to cast at least one-half of the votes of the Committee. However, the minutes of the convention demonstrate that no such appropriate application for a roll-call vote was ever made (*see Id.*, at 461).

In *Donnelly* the Appellate Court noted, as evidenced above, that the Committee Rules, which require a voice vote, also allows a roll-call vote to be conducted upon the demand of one-half of the votes of the Committee. Furthermore, in *Donnelly* the Appellate Division noted that the minutes of the meeting failed to demonstrate there was an appropriate application for a roll-call vote. In the instant proceeding there are no minutes for the 2018 County Committee organizational meeting which could otherwise guide this Court.

Based on the exception to the County Rule which calls for voice voting, it is clear to this Court that the will of the majority of the committee cannot be thwarted by possible subjective or objective inaccuracies in the voice vote system, provided the Chairman of the meeting acts fairly and allows the County Committee to determine if one-half of its members seek such a roll-call vote. One significant and comprehensive roll-call vote can establish the majority which should and would be honored by the entire County Committee.

The Court has reviewed the Committee Rules applicable in the *Donnelly* case and the Committee Rules pertinent to the instant proceeding and finds that the specific rules pertaining to voice voting and roll-call voting are substantially, if not entirely, the same (*see* Petitioner's Exhibit 1, Article IV, Section 5, page 11); *Donnelly v Curcio*, Record on Appeal, page 40). In the case at bar, this Court finds that numerous requests for a roll-call vote were appropriately made, yet not one roll-call vote was conducted at the meeting. The Chairman failed to allow either faction at the meeting to establish their majority at this meeting and the voice votes taken are not reliable for reasons other than the failure to have a roll-call vote. This failure on the part of the Chairman makes it impossible to determine who was elected at this meeting.

The Court recognizes that it may be normal for a committee to conduct its business by voice vote and, in fact, the Committee Rules required the Chairman to take voice votes or, in his discretion, a show of hands for all votes at all meetings of the County Committee. However, when a roll-call vote is properly demanded there must be a roll-call vote on that question. To allow a voice vote on a request for a roll-call vote would allow the general rule to eviscerate the exception. By conducting one roll call on a vote prior to the filling of vacancies, the support of the majority of the elected committee members would have been firmly established and the remainder of the business could quickly move forward. A demand for a roll call should not frustrate the committee or affect its meeting. The requests for a roll-call vote were made on many occasions and Respondents have failed to characterize, show or prove that these applications were improperly made. Any failure to

properly make such application should have been noted by the Chairman or "Parliamentarian" had her advice been sought.

Respondents' assertions that there were no competing slates offered at the meeting is of no avail. The County Committee had the equal right to reject a slate as it had to approve one.

The Chairman of the 2018 meeting failed to act in a manner to safeguard and not abridge the voting rights of the elected County Committee members who came to the organization meeting to vote for and elect their party's officers. The Court concludes that the meeting was imperfectly organized and that the irregularities thereat make it impossible to determine whether or not the Respondents were rightfully elected to the party positions they now occupy. Further, the meeting appears to have devolved into a shouting match between factions with no rule of order firmly established. Therefore, it is

ORDERED and ADJUDGED that the Certificate of Election filed at the Suffolk County Board of Elections and all other documents filed therewith as to the Suffolk County Conservative Committee of the Conservative Party of the State of New York organizational meeting held on September 26, 2018 are null and void; and it is further

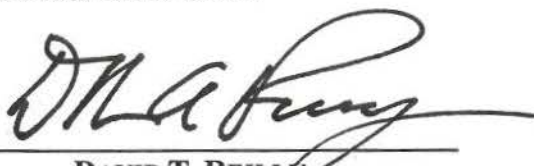
ORDERED and ADJUDGED that the organizational meeting of the Suffolk County Conservative Committee of the Conservative Party of the State of New York held on September 26, 2018 is null and void, together with all actions and elections conducted at said meeting; and it is further

ORDERED and ADJUDGED that the parties are directed to attend a conference of this matter before this Court on **March 15, 2019** at 9:30 a.m. for the purpose of determining a process and procedure for the holding of a new organizational meeting that conforms with the Election Law and Committee Rules, including the selection of a monitor acceptable by the parties and with the approval and under the direction of the Court; and its further

ORDERED and ADJUDGED that after the conference directed above, a new organizational meeting for the Suffolk County Conservative Committee of the Conservative Party of the State of New York shall be noticed by the Chairman of the County Committee, only to committee members properly elected after the 2018 Primary Election on a date, time and place acceptable to the Court.

The foregoing constitutes the decision and Order of the Court.

Dated: March 1, 2019
Riverhead, New York



DAVID T. REILLY
JUSTICE OF THE SUPREME COURT