SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

In the Matter of Claudio Guazzoni de Zanett, aggrieved voter and Public Advocated for the Village Petitioner, - against - THE VILLAGE OF TUXEDO PARK, and Elizabeth Doherty, Village Clerk and Chief Village Election Official, and Respondent Candidates, David C. McFadden, Marc D. Citrin, Joshua S. Scherer and Paul A. Brooke Respondents.	**ATTORNEY AFFIRMATION IN OPPOSITION TO RESPONDENT'S MOTION FOR DAMAGES** Index No. EF005663-2023

JAMES P. CURRAN, ESQ., an attorney duly admitted to practice law in the courts of the State of New York, hereby affirms the following under penalties of perjury:

1. I am an attorney duly admitted to practice before this Court and the attorney for Cross Petitioner and Respondent-Candidate Marc D. Citrin (hereinafter "Cross-Petitioner" for sake of clarity). I am fully familiar with the facts and circumstances set forth herein.
2. I make this affidavit in opposition to Respondent Village and Trustees and Motion for Damages (NYSCEF docket no's 229-53) (hereinafter "Respondent-Movants") relating to legal fees purportedly incurred by Respondent Village and Respondent Trustees Scherer and Brooke. This third attempt to seek damages in legal fees follows a decision by this Court to deny a previous order requesting this relief (NYSCEF docket no. 217) and Respondent-Movants withdrawing a similar motion after defects were highlighted by the Court (NYSCEF docket no. 228).
3. There is an overall question of whether Counsel Gilbert even has the legal authority to bring this motion. Under Village Law §4-400(1)(c)(i), only the Village Mayor has the authority to appoint, terminate, and replace village counsel. The notion that village trustees can subsume this role has been rejected by the Courts. Incorporated Vil. of Manorhaven v. Toner, 51 Misc.3d 545, 549-50 (Sup. Ct., Nassau Co., 2016). *See also:*

Matter of Briggs v. Harmin, 96 A.D.2d 616 (3d Dept., 1983). At the very least in a case of a Mayor being conflicted out of such duties transfer to the Deputy Mayor before they go to Village Trustees.

4. In declining to sign the original Order to Show Cause seeking attorney's fees and costs, the Court correctly noted that Counsel Gilbert does not represent the Village. (NYSCEF Docket No. 217). The purported substitution of counsel is signed by a village trustee, not the mayor or at the very least the Deputy Mayor, and therefore should not be deemed to be valid. (NYSECF Docket No. 220). For this reason alone, this motion should be dismissed as a matter of law with prejudice by the Court.
5. As a threshold matter, this Court properly decided that Cross-Petitioner, as a candidate for the public office of Mayor of Tuxedo Park, had standing to seek leave to file cross-claims as a candidate-aggrieved pursuant to Election Law §16-106. *See NYSCEF Docket No. 168 "Transcript of Proceedings- July 19, 2023" pg. 8, line 7- pg. 10, line 2; see also: In Re Funkhouser, 157 Misc. 400, 402 (Sup. Ct., Westchester Co., 1935) (holding that if a candidate anticipates adverse action by a board of canvassers, they may seek relief from court).* Additionally, such cross-claims were brought on notice and with approval of the Court as required by the Election Law. *See White v. Bilal, 21 A.D.3d 573 (2d Dept., 2005).*
6. In so much as Respondent-Movants motion for damages is predicated upon lack of standing by Cross-Petitioner or "legal malice," such notions are rejected by this Court's ruling on Motion 3 that is referenced above, ample precedent in case law, a plain reading of Election Law §16-106, and prior inconsistent statements by Respondent-Movant's own counsel.
7. Counsel for Respondent-Movant acknowledged several times on the record that Cross-Petitioner has standing and a legal interest in the proceeding. During a lengthy discussion about standing, Counsel stated: "If there's going to be a challenge by Mr. McFadden or Mr. Citrin, then that's their right because they're candidates…" *See NYSCEF Docket No. 171 "Transcript of Proceedings- August 16, 2023" Pg. 34, line 19-21.* Counsel went on to state: "If there's a problem, Mr. Citrin has standing, Mr. McFadden has standing." *Id., Pg. 36, lines 10-12.* Despite these statements, Counsel for Respondent-Movants is now

claiming damages sustained by Cross-Petitioners purported inability to obtain the relief sought.

8. There is also significant precedent within the Election Law that the awarding of attorney's fees and costs is not available in such proceedings as such award is not expressly allowed by a provision of the Election Law. Gage v. Moneschalchi, 17 A.D.3d 770, 771 (3d Dept., 2005). The Court in Gage explicitly stated:

   "As for plaintiffs' claim for counsel fees, it is the well-settled rule in New York that such fees are considered incidents of litigation, rather than damages, and are not recoverable unless authorized by statute, court rule or the parties' written agreement. (citations omitted). Here, plaintiffs cite no statute or other authority that explicitly provides for awards of counsel fees to successful litigants in proceedings brought pursuant to the Election Law." Id.

9. In the present case, just as in Gage, Respondent-Movants cite no statutory authorization for the awarding of attorney's fees and costs under the Election law, because it does not exist. Respondent-Movants rely exclusively on cases from other causes of action. *See also: Matter of Burkwit v. Olson 98 A.D.3d 1236, 1239 (4th Dept., 2012) holding awarding of fees must find authorization in statute, for which there are no provisions for in the Election Law; Baker v. Health Mgt. Sys., 98 N.Y.2d 80, 87-8 (2002) providing Court of Appeals precedent for attorney's fees requiring explicit statutory authorization which was followed by the Court in Burkwit.*

10. In arguendo, Respondent-Movants sole claim to damages is incursion of attorney's fees and expenses in the astonishing amounts of $181,153.00 for Respondent Village and $99,073.35 for Respondent Trustees. (NYSCEF Docket No.230 ¶112; see also: 237 ¶19, 238 ¶10, & 240 ¶33). These figures are provided with virtually no context or rationale as to how they were calculated, depriving the Respondents of any ability to determine if the fees and expenses are remotely reasonable due to redactions and questionable assertions of privilege.

11. As the movant in this motion for purported attorney's fees, the burden is on Ms. Gilbert to demonstrate that such fees are reasonable and justified. Instead, she has chosen to hide behind attorney-client privilege and prevent any actual scrutiny of the calculation of the purported attorney's fees, regardless of who the representative attorney was throughout

litigation. *See: Orser v. Wholesale Fuel Distributors-CT, LLC, 64 Misc.3d 449, 454 (Sup. Ct. Greene Co., 2018).* The Court in Orser specifically held that where settlement to attorney's fees is not possible, the fee applicant bears the burden of proof by documenting appropriate hours.

12. At the very least, the involvement of multiple attorneys and completely redacted supporting evidence should require a full evidentiary hearing to properly understand the extraordinary amount of compensation in this matter and whether it was reasonable and appropriate. *See Pa Sulaymen Mn Jeng v. Barrow Jeng 55 Misc.3d 281, 284 (Sup. Ct. Monroe Co., 2016) (where a Court cannot decide reasonableness of attorney's fees based on evidentiary facts in dispute a hearing is required).*
13. Examples of evidentiary facts in dispute exist even within Respondent-Movants own positions. At the last court appearance Respondent-Movant stated that Mr. Nugent acted without legal authority when discussing settlements and stipulations, yet now seeks damages for fees charged by Mr. Nugent while engaged in those very discussions. (NYSCEF docket no. 240 ¶33).
14. At the last court appearance which prompted Ms. Gilbert to withdraw her last application for attorney's fees the Court was quite clear that proof of fees must be provided and available to the opposition.
15. In Forestsire v. Inter-Stop the Second Department held that (1) attorney client privilege to fee documentation is waived when seeking fees, and (2) non-compliance with court directives related to fees can result in dismissal with prejudice. 211 A.D.2d 751 (2d Dept., 1995).
16. As it relates to the instant matter, Ms. Gilbert is on her third (and final, according to Your Honor) attempt at seeking purported attorney's fees and, despite clear direction from this Court to attach evidence of fees, she has attached bare bones affirmations and redacted receipts which deprive counsels of determining whether such fees are reasonable.
17. A thorough review of documents inappropriately asserted as privileged will only lead to increased costs for Cross-Petitioner and represent a needless exercise intended to prolong and protract this litigation.
18. The incursion of fees of $99,073.00 for individuals whose election was not in question, nor being challenged in any meaningful way is astounding. (NYSCEF Docket No.100 ¶¶

25-31). Cross-Petitioner specifically stated that he was not making any claims against Respondent-Trustees which should prohibit them from seeking damages such as these from him. (Id.). This is only to be topped by the Respondent-Village somehow incurring charges double that of the Respondent-Trustees, despite both parties joining in motions together at times and other times submitting near identical papers.

19. It is also completely unclear from Respondent-Movants filings what purported damages were incurred by Trustee Scherer since Ms. Gilbert's fee was purportedly paid solely by Trustee Brooke. *See NYSCEF Docket no. 248).* As such, Trustee Scherer has no standing to claim damages in this matter. This however, is only raised to show what a farce the entire application for damages truly is.
20. It should be noted that an overwhelming portion of the Affirmation in Support concerns purported actions by Petitioner Guazzoni de Zanett. Respondent-Movant is attempting to conflate actions by Petitioner and Cross-Petitioner as one in the same. Until this motion for damages, attorney's fees and expenses was filed Cross-Petitioner was a pro se litigant which again casts doubt on the notion that he should be responsible for nearly $300,000 in purported damages.
21. As to the claims by Respondent-Movants that Cross-Petitioner engaged in "bad faith" and "legal malice," both allegations are without merit. The cross-petition was filed to protect the rights of candidate-aggrieved to ensure invalid, ineligible, or otherwise unqualified votes were not cast in Cross-Petitioner's own election.
22. As a candidate aggrieved, Cross-Petitioner had legitimate legal interest separate and apart from Petitioner which is why the Cross-Petition was appropriate and eventually granted. As Counsel Burger raised in his Affirmation, this case involved "multiple issues of first impression" further supporting the right of Cross-Petitioner to present his own arguments and legal theories. (NYSCEF docket no. 251 ¶11).
23. Respondent-Movants make several misstatements of fact, conflating the procedural history of this case, in hopes of confusing the Court into believing there is evidence of legal malice and bad faith by Cross-Petitioner. Notably, from Respondent-Movant's Attorney Affirmation in Support (NYSCEF Docket No. 230):
    a. ¶65 seems to imply that Sheila Tralins did something nefarious in requesting absentee ballot applications, when learned counsel surely knows this is standard

practice in the lead up to election day in order for candidates to monitor turnout and legality of ballots requested, and is arguably more in line with good faith efforts to verify applications than any negative implication;

b. ¶75 states that Cross-Petitioner brought cross claims to protect the standing of Petitioner Guazzoni De Zanett yet provides no direct citation for this specious claim. Respondent-Movants seem to be conflating Cross-Petitioner correctly asserting his own standing as something malicious. As discussed previously, Cross-Petitioner has standing and an interest separate and apart from Petitioner as a candidate-aggrieved seeking to preserve his rights during litigation relating to his own election. As a candidate who would suffer irreparable harm if ballots were cast by unqualified and unregistered voters, Cross-Petitioner was protecting his own rights and interests by cross-petition, in satisfaction of the requirements of Election Law §16-106(5);

c. ¶115(fn. 15); states that Cross-Petitioner won the election, which fails to acknowledge the "stay" vigorously argued for by then Respondent-Village's counsel which prevented such certification and swearing in of Cross-Petitioner. (NYSCEF Docket No. 171, pg. 7 lines15-24; pg.12 lines 21-5; pg. 14 line 16- pg. 15, line 17);

d. ¶116(j) seems to criticize Cross-Petitioner for not withdrawing their petition, despite the lengthy on the record discussion about keeping such petition open due to impending litigation by Respondent McFadden. This was supposed to be brought as a related case, and this Court stated that withdrawing the cross-petition "may be premature" (NYSCEF Docket No. 171, pg. 60, lines 19-20, *see also Id., pg. 49, line 23- pg. 53 line 16 for longer discussion*); and

e. ¶116(j) insists that Petitioner inappropriately maintained this proceeding after being sworn in and an oath of office accepted for filing. Such claim fails to acknowledge that Respondent Village and Trustee Counsel rejected such filing and that a separate proceeding was brought by Respondent McFadden. (NYSCEF Docket No. 171, pg. 7 lines15-24; pg.12 lines 21-5; pg. 14 line 16- pg. 15, line 17).

24. Respondent-Movants entire "bad faith" argument as a rationale for awarding attorney's fees and expenses does not cite a single case in support of their position where fees are awarded on such basis. They offer only a single passing reference to Hughes v. Delaware Ct'y Bd. Of Elections, but not for purposes of justifying attorney's fees. 217 A.D.3d 1250 (3d Dept., 2023). This misconstrued interpretation of Hughes is also incorrectly asserted as justification for costs and sanctions by Respondent-Movants. (NYSCEF docket no. 128).
25. The Court in Hughes ruled solely on the application of Election Law §9-209 based on when and by whom voter residency challenges could be made. 217 A.D.3d 1250, 1255. It has no bearing on challenges based on voter registration as it relates to qualifying for an absentee ballot, which is a specifically enumerated category of allowable challenges at a canvass pursuant to Election Law §9-209(2) and (8).
26. There are also assertions that Cross-Petitioner attempted to impose duties on the Village Clerk in "bad faith". Whether the ultimate responsibility for determining voter qualifications rests with the village clerk or the election inspectors, the point of the temporary restraining order is to preserve ballots in question for review by the Court. *See generally Election Law §16-106.* The village election inspectors are not a necessary party to an election proceeding. Ecker v. Cohen 43 N.Y.S.2d 951, 953-4 (Sup. Ct. New York Co., 1943). As the chief election official, pursuant to Election Law §15-124, the Village Clerk is the necessary party. Naming the Clerk is required since any temporary relief sought will directly impact her statutory duties.
27. Respondent-Movants argument of "legal malice" also cites no precedent of such theory being applied in election law proceedings. Instead, they rely on an extremely narrow reading of Election Law §15-120 that would require village clerks to hand absentee ballots blindly to anyone who walks into Village Hall. (NYSCEF Docket No. 230 ¶122). It also ignores the plain text of the statute.
28. Election Law §15-120(5) provides:

> "An application must be received by the village clerk no earlier than four months before the election for which an absentee ballot is sought. If the application requests that the absentee ballot be mailed, such application must be received not later than seven days before the election. If the applicant or his or her agent

> delivers the application to the village clerk in person, such application must be received not later than the day before the election. **The village clerk shall examine each application and shall determine from the information contained therein whether the applicant is qualified under this section to receive an absentee ballot.** The clerk in making such decision shall not determine whether the applicant is a qualified elector, said determination being reserved to the inspectors of election as is hereinafter provided in subdivision nine of this section." (emphasis added).

The initial review of the application calls for a review of if such applicant is "qualified under this section," which entails checking the registration status of the voter since being registered is a condition precedent for applying to vote absentee. The cross-petition raised issues of first impression where individuals were issued absentee applications and ballots before they were registered to vote, in violation of the oath in such application and lacking the critical qualification of being a properly registered voter in requesting such application and ballot. (NYSCEF Docket No. 49 ¶¶13-15).

29. Respondent-Movants ignore the above emphasized provision and place sole focus on the last sentence. The determination of "qualified elector" is based on voter registration status, residence, and other issues not apparent from the initial review by the clerk. *See Powell v. Weyant*, 307 A.DD.2d 472, 473 (3d Dept., 2003). To hold otherwise makes a mockery of the statutory process and requirements surrounding absentee ballots at village elections.
30. Continued reference to the Hughes decision as justification for attorney's fees and expenses ignores the fact that there is an established process under Election Law 16-106(5) that explicitly allows for temporary restraining orders to be put in place. Citations supra.
31. The Appellate Decision (Index #2023-06463) speaks only to Petitioner Guazzoni de Zanett's failure to demonstrate irreparable harm and is silent as to the cross-petition. (NYSCEF Docket No. 230 ¶104). Any insinuation that this determination has bearing on requiring cross-petitioner to pay attorney's fees and expenses is misplaced.
32. Respondent-Movants also make several baseless claims which state that Cross-Petitioner should have simply let the questionable electoral process play out and he would have won

anyway. ((NYSCEF Docket No. 230 ¶¶91, 92, 123). Quite simply this is pure speculation that can only be confirmed after the fact. Cross-Petitioner acted prudently during complex litigation, in which he was a respondent, to preserve his rights as a candidate under the Election Law. It also ignores the possibility of litigation by the eventual loser former mayor McFadden which was only confirmed after the conclusion of the election.

33. Respondent-Movants have bemoaned that this proceeding was instituted ex parte and temporary relief was sought (NYSCEF docket no. 230 ¶69), while ignoring that similar litigation involving the same parties was brought ex parte by former mayor McFadden seeking temporary relief. *See McFadden v. Orange Co. Bd. Of Elections, et. al. Index #EF005663-2023, docket no 8.* The reason no such application has been made by Respondent-Movants in that action is that this motion is not actually about righteously seeking fees, but rather about continuing to litigate petty squabbles between present and former elected officials.
34. The litigation before this Court has been lengthy and contentious; this motion is a desperate attempt to continue the hostile and acrimonious back and forth that has dominated this proceeding. The election has been decided, all properly elected candidates are now in office, and multiple cases have been dismissed by this Court. It is now time to move on and govern together as the voters have instructed these parties to do.

WHEREFORE, Cross-Petitioner and Respondent-Candidate Citrin respectfully requests a denial of the motion for awarding attorney's fees, expenses, and damages by Respondent Village and Respondent Trustees, and for such other relief deemed just and proper by the Court.

Dated: Albany, New York
December 1, 2023

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