January 15, 2018

Clerk's Office
Superior Court of New Jersey
Essex County Courthouse
50 West Market Street
Newark, N.J. 07102

The Hon. Thomas R. Vena, J.S.C.
Essex County Superior Court
Hall of Records
470 Martin Luther King Jr. Blvd., 4th Fl.
Newark, N.J. 07102

Re: **City of Orange Township Bd. of Education v. City of Orange Township, et al.**
Docket No. ESX-L-6652-17

Dear Judge Vena:

On behalf of Defendant Committee for an Elected Orange School Board ("Committee of Petitioners" or "Committee") in the above-referenced matter, please accept this Letter Reply Brief in response to Plaintiff City of Orange Township Bd. of Education ("BOE")'s brief in opposition to the Committee's Motion for Sanctions *Nunc Pro Tunc*, pursuant to R. 4:42-9, R. 1:4-8 and N.J.S.A 2A:15-59.1.

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PRELIMINARY STATEMENT

In its papers, the BOE simply asserts that it acted in good faith to "ensure that the Board's general election was conducted in accordance with the law." BOE Br. at 6. It justifies its decision to commence litigation and pursue an appeal "because on July 6, 2017, Corporation Counsel issued an opinion sharing the same legal theory." Id. at 11. The BOE leaves out, however, the fact that the theory articulated in this allegedly confidential memo prepared for the Mayor by a Deputy City Attorney, was ultimately questioned by Corporation Counsel when he advised the City Clerk that she could proceed with processing the COP's Reclassification petition as she saw fit. The BOE is thus hiding behind the advice given to a third party (the City) and ignores the advice the BOE itself was offered by the then lead counsel for the New Jersey School Board Association; moreover, the BOE does not explicitly rely on the legal opinion of its own counsel. In defense to this Motion,

Mr. Edelstein neither offers us his own memorandum advising the BOE of the merits of the legal theory asserted in the Complaint nor any testimony as to his investigation of factual matters asserted in the Verified Complaint, most significantly the alleged $45,000.00 cost to the BOE for the March 2017 special election. Instead, the BOE simply dismisses all evidence of bad faith presented by the Committee as "irrelevant;" and rejects the Strategic Lawsuit Against Public Policy ("SLAPP") paradigm, because the Committee does not have a "smoking gun" where members of the BOE publicly admitted that they authorized and pursued this litigation to prevent the taxpayers from reclassifying the Board from an appointed Board to an elected one.

The procedural history in this case indicates that the New Jersey Supreme Court's opinion in Tumpson v. Farina, 218 N.J. 450 (2014) worked as a deterrent to political obstruction by municipal officers acting at the behest of local politicians when Corporation Counsel decided that the law and facts in this matter did not justify depriving the COP of its statutory right of petition. Rather than risk liability under the New Jersey Civil Rights Act, N.J.S.A. 10:6-2 ("CRA"), Corporation Counsel permitted the City Clerk to process the petition in accord with the statute. It appears that he did not even think that there was a colorable claim to stop the petition, for if he had, the

proper course of action would have been for the City Clerk to make an application before a court for instructions by way of a declaratory judgment action.

Instead, what we have here is a third party, relying on the discredited advice given to a Mayor, going to court to enjoin the City and County Clerks from satisfying their statutory duties and seeking to deprive COP of its civil rights. Such use of the courts is a manifestation of political obstruction that the CRA does not deter; but, as matter of public policy cannot be tolerated.

Accordingly, the COP brings this Motion for Sanctions; the shamelessness of the BOE and its persistent resistance to the will and desires of the public for an elected school board cannot go unchallenged. Before the next school board, Mayor, or City Council member and their attorneys, decide to use taxpayer money to enjoin a referendum that challenges their own institutional interests, they must know that flimsy legal theories and made-up facts in an attempt to sway the court of public opinion in their favor will not protect them from liability in the courts of law under the frivolous litigation statute and rule, together with their attorney's fee sanctions. The procedural history of this case, statements made by BOE members, the about face of Corporation Counsel when the City realized that the COP was represented, and the emptiness of the

legal proposition that the holding of an invalid election can preclude the re-run of that election together scream "Bad Faith", and should not be ignored.

LEGAL ARGUMENT

I. The BOE's Reliance on the Legal Opinion Prepared for The Mayor, Which Was Not Followed by Corporation Counsel, Is a Suspect Defense to a Claim of Frivolousness.

The BOE notes,

> No matter how misguided the Board's argument may have been, it proffered an honest and well-reasoned argument based [sic] well-settled legal principles. Such creative advocacy must not be discouraged nor punished by sanctions. [case omitted]

BOE Br. at 11. This statement, however, is not followed with any credible facts supporting the conclusion that the legal claim asserted in the Verified Complaint was honestly made, well-reasoned nor in accord with well-settled legal principles governing the interpretation of election laws. Rather, the BOE and its attorney posit that "[t]he COP cannot successfully argue that the Board did not have a reasonable good faith belief in the merit of its case, partly because on July 6, 2017, Corporation Counsel issued an opinion sharing the same legal theory. Id.

Aside from the fact that the BOE does not reveal when it received this memo written by a Deputy City Attorney to the Mayor and a councilman, under what circumstances it received

this privileged and confidential memo, and whether BOE members and Mr. Edelstein relied on this memo when deciding to institute litigation against the City Clerk and the COP, sharing the same legal interpretation of a statute with someone does not necessarily make that opinion either honest or well-reasoned. The failure of the Deputy City Attorney to address established principles of election law (as Mr. Edelstein also did not do in his briefs), including the liberal construction of such laws and the fact that voided elections have no legal effect, stands out as a significant flaw in his reasoning. Moreover, he is not a random attorney. He is a deputy city attorney whose client, in this case, the Mayor and one City Councilman, likely shared the same interest as the BOE to keep the school board appointed by the Mayor, rather than elected. In this way, two identical opinions that are poorly reasoned and incorrect do not render that opinion well-reasoned or correct.

The BOE's production of this memo and reliance thereon to argue against the COP's assertion that they knew that there claim had no merit is particularly suspect under the circumstances in this matter. Since this court invalidated the Reclassification Election held in November 2016, and Special School Board Election held in March 2017, it appeared to the COP that there was concerted resistance by the Mayor, some City Council members and the BOE to prevent the Reclassification

Referendum Election from recurring, as contemplated by this Court in its April published opinion. See Certification of Tyrone Jon Tarver, ¶4. The July 6, 2017 memo was part of that effort. Though effective insofar as the City Council declined to submit a reclassification question to the City Clerk for processing, Corporation Counsel was forced to revisit the merits of that advisory opinion when faced with the COP's referendum petition (and the fact that the COP was represented by counsel). Indeed, rather than have Orange Township risk liability under the CRA, counsel rejected its reasoning and directed the City Clerk to process the petition in accord with her duties under the statute. If this was simply the proverbial story claimed by many lawyers that there are two sides to every issue and both are equally plausible, then Corporation Counsel had a legal duty to go to court on behalf of the City Clerk to obtain guidance through a declaratory judgment action. He did not; and, a discredited legal opinion produced ostensibly for political reasons cannot protect the BOE and its attorney from the reality that the position they took in court was not just weak, but given well-established precedent and principles of election law, frivolous.

II. The Totality of Circumstances Presented in this Matter Constitute a Strong Showing that the BOE Acted in Bad Faith.

In addition to pointing to the emptiness of the BOE's legal claim, the COP presents several facts in support of its claim that the BOE and its attorney acted in bad faith when commencing and prosecuting this litigation. The BOE simply dismisses all such evidence as "irrelevant;" and rejects the SLAPP framework, because the Committee does not have a "smoking gun" like the developer's false claim of extortion lodged against Mr. Price (in order to get him withdraw his opposition to its site plan application) that existed in Maximus Real Estate Fund, LLC v. Marotta, No. A-5501-07T1, 2009 N.J. Super. Unpub. LEXIS 2228 (App. Div. Aug. 13, 2009)(granting sanctions in response to a SLAPP action).

Although the BOE's lawsuit does not meet the exact definition of a SLAPP lawsuit as defined in the Appellate Division opinion in LoBiondo v. Schwartz, 323 N.J. Super. 391, 418 (App. Div.), certif. denied, 162 N.J. 488 (1999) insofar as it was not brought against the COP just to harass the Committee and not necessarily to win, it does share a seminal characteristic with SLAPPs: that is, the intent to interfere with the citizens' constitutional and statutory rights to speak and petition government, and to deter others from fighting "City Hall." Because the "bad faith" motive is the same, the use of the frivolous litigation statute and rule, together with their attorney's fee sanctions, are an appropriate means to combat

such a politically strategic lawsuit as the BOE initiated herein. LoBiondo v. Schwartz 199 N.J. 62 (2009).

At the time they were made (and since), there was little doubt in Tyrone Tarver's mind that statements made by Orange BOE members at a school board retreat that they disagreed with the opinion of the New Jersey School Board Association lead counsel that the Frequency Restriction at issue in this litigation did not apply in face of the voided November 2016 Referendum election indicated a willingness to employ such theory to achieve their desired goal -- *i.e.*, maintenance of an appointed school board. Though the statements made and heard by Mr. Tarver did not make the connection explicitly, they came sufficiently close. Similarly, a statement made by Councilwomen Tency Eason indicated an intent to prevent the Reclassification question from appearing on the ballot simply because she did not think it was a good idea. Tarver Cert., ¶4. These statements are not irrelevant as the BOE asserts; they are indicative of a wrongful intent to interfere with the civil rights of the COP, and the voters they represent.

Similarly, the initial attempt by Corporation Counsel to prevent the City Clerk from processing the COP's petition, his reversal on the issue in face of information that the COP was represented by counsel, and the BOE's statement that they were not properly informed of the Clerk's decision reek of a

concerted effort by the BOE, and some City officials, to prevent the reclassification question from appearing on the ballot.

Though it is true that the City Clerk did not copy the BOE on either of her letters to the COP, the latter's denial of knowledge of such submission (though BOE members were told by Mr. Jeffrey Feld at the August 29, 2017 Board meeting) and statement that the BOE only found out about it via the newspaper is not credible. Unless the BOE thought they had a "deal" or "understanding" with the Mayor and City Council that the Clerk was going to stop the process, the BOE, like other third parties would have been monitoring the process. Accordingly, this declaration of no knowledge ironically reveals a probable attempt by some City Council members and the BOE members to prevent the election from occurring. The existence of such a tacit understanding would also explain the BOE's outrage at the City Clerk, as expressed in the Verified Complaint, for spoiling the BOE's plans.

The BOE's assertion that its misrepresentation of the cost of a school board special election was "obviously" a mistake is also not credible. Unlike the prosecutors in United States v. Durant, 2012 U.S.Dist. LEXIS 174906 *6-7, whose failure to disclose certain Brady evidence was found by the court to be "inadvertent", the BOE's misrepresentation of the expenses cannot be similarly characterized. Neither the BOE nor its

counsel has attested to the procedures it employed to come up with the $45,000 number. Making inaccurate allegations in a complaint to achieve a certain effect on the court without undertaking any investigation is the type of action that the sanctions rule is intended to deter. It appears that the BOE was willing to make such a grossly inaccurate allegation without any fear of being held accountable; yet another reason to grant sanctions in this matter.

Finally, the BOE fails to explain its refusal to cooperate with the County Clerk with respect to holding a January special election as explicitly requested in the Reclassification Petition. The fact that legally a special election may be held in March, as it was in 2017, does not explain the BOE's efforts to stymie the specific will of the voters. Though such resistance occurred after the Referendum Election was held, it like all the actions and statements noted above, cumulatively establish that the BOE has been acting in bad faith since the filing of its lawsuit against the COP, City Clerk and County Clerk, if not before.

CONCLUSION

For the forgoing reasons set forth herein and in the COP's initial papers, this Court should grant the Committee attorneys fees and costs against the BOE and its attorney under the frivolous litigation rule, and the BOE, under the frivolous litigation statute. The BOE and its counsel cannot employ taxpayer monies solely to maintain themselves in power and to deprive the public of their statutory right of referendum. No opposition to the reasonableness of the COP's fees and costs has been lodged by the BOE, or other party served with this Motion.

Respectfully submitted,

Renée Steinhagen

Renée Steinhagen, Esq.

cc: Stephen Edelstein, Esq.
Eric Pennington, Esq.
Joseph Garcia, Esq.
Raj Parikh, Esq.