SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

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TIM HARKENRIDER, GUY C. BROUGHT, LAWRENCE CANNING, PATRICIA CLARINO, GEORGE DOOHER, JR., STEPHEN EVANS, LINDA FANTON, JERRY FISHMAN, JAY FRANTZ, LAWRENCE GARVEY, ALAN NEPHEW, SUSAN ROWLEY, JOSEPHINE THOMAS, AND MARIANNE VIOLANTE,

Index No. E2022-0116CV

Petitioners,

-against-

GOVERNOR KATHY HOCHUL, LIEUTENANT GOVERNOR AND PRESIDENT OF THE SENATE BRIAN A. BENJAMIN, SENATE MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE ANDREA STEWART-COUSINS, SPEAKER OF THE ASSEMBLY CARL HEASTIE, NEW YORK STATE BOARD OF ELECTIONS, AND THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT,

Respondents.

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MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION FOR THE COURT TO DRAW ADVERSE INFERENCES FROM RESPONDENTS' AND THEIR AGENTS' FAILURE TO APPEAR AT DEPOSITIONS

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PRELIMINARY STATEMENT

Various Respondents and their agents have brazenly defied this Court's directives. In two separate decisions and orders, this Court unequivocally granted Petitioners the right to seek expedited discovery against Respondents and certain third parties, to probe whether unconstitutional and impermissible partisan intent infected the 2022 redistricting process in New York. The Court explicitly ruled that Petitioners could seek discovery (without limitation on form) against "[m]embers of the IRC and . . . members of LATFOR" as well as Respondents, and that New York's qualified legislative privilege will not lie to bar such discovery, given the critical issues raised in the Petition and the need for such discovery to determine the extent to which the clear partisan result of the 2022 maps was caused by Respondents' intent to favor the Democratic Party, as well as the fact that some of the discovery targets are not even legislators. NYSCEF No.126 at 2–3.

Moreover, this Court, bound—as are the parties—by the Constitutionally-mandated 60 day deadline in this matter, further ordered that "all discovery shall be completed by March 12, 2022," and directed that "[a]ll persons asked to provide discovery are to give this his/her highest priority and to set aside other matters." NYSCEF No.126 at 3. As quickly as possible after this Court's entry of a conforming Order reflecting that decision, NYSCEF No.135; *see also* NYSCEF No.134, and fully consistent with this Court's own language on permissible topics of discovery, Petitioners served Respondent LATFOR and LATFOR members Phillip Chonigman, Michael Gianaris, and Eric Katz with notices of depositions.[*] *See* Affirmation Of Bennet J. Moskowitz ("Moskowitz Aff."), Exhibits A–H.

[*] Petitioners also served IRC Commissioner David Imamura with a deposition subpoena to appear for deposition on March 11, 2022, within this Court's deadline for discovery, but he too failed to appear. Moskowitz Aff., Exhibit E. While Petitioners contend that his failure to appear

Regrettably, and notwithstanding the Court's very clear directives, counsel for each of the deponents responded to Petitioners' subpoenas/notices by attempting to relitigate issues already decided by this Court's discovery decisions, asserting false procedural issues, and, most shockingly, declaring that the deponents had no intention of appearing at the depositions. Moskowitz Aff., Exhibits J–P. Petitioners explained to each attorney that these depositions were entirely consistent with the Court's discovery Order and Decision, and that failure to appear for these duly noticed depositions would result in serious consequences under New York law. *Id.*

On March 11, 2022, none of the deponents appeared at the time and place for their depositions. Moskowitz Aff., Exhibits Q–S. Importantly, however, Counsel from the Attorney General's office attended the depositions, thus exposing the other counsel's absence as inexcusable. Moskowitz Aff., Exhibits Q–S. Counsel for Petitioners thereafter read into the record the questions that Petitioners had intended to ask each deponent, given that all parties and deponents were aware of the scheduled depositions and this Court's own Order authorizing the depositions. *Id.*

Petitioners now request, consistent with CPLR § 3126, that this Court draw adverse inferences against each deponent for his failure to appear and answer questions at the duly scheduled time and place for his deposition.

In light of Respondents' outright refusal to engage in the depositions, even after this Court's multiple decisions and orders on the issue, this presents "exigent circumstances" such that the meet and confer requirements under the Uniform Rules are inapplicable. *See* 22 NYCRR

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was equally improper given this Court's decisions and orders for discovery, Petitioners believe that this Court awarding them adverse inferences against Respondents for failure to appear is sufficient to remedy the complete failure to engage in the discovery ordered by this Court. Petitioners preserve their right to seek all appropriate relief from Mr. Imamura's failure to appear.

§ 202.20-f(b). In any event, the parties did exhaust all meet and confer attempts: they corresponded at length about their respective positions on the propriety of discovery after this Court's Order and before Respondents' and their agents' complete refusal to attend the depositions, *see* Moskowitz Aff., Exhibits J–P, which suffices for "consultation" given the press of time in this case, 22 NYCRR § 202.20-f(b).[†]

ARGUMENT

This Court is "vested with broad discretion to control discovery" including by entering any reasonable "sanction[s] upon a party" for failure to comply with discovery orders. *Iskalo Elec. Tower LLC v. Stantec Consulting Servs., Inc.*, 113 A.D.3d 1105, 1106 (4th Dep't 2014).

I. This Court Should Draw Adverse Inferences From Respondents' And Their Agents' Failure To Appear For Depositions Scheduled Within This Court's Deadline For Discovery

Under the Civil Practice Law and Rules, this Court may "make [any] such orders" it deems necessary to remedy the "refus[al] to obey an order for disclosure or wilfull[ ] fail[ure] to disclose information which the court finds ought to have been disclosed" by "any party" or party's "officer, director, member, employee or agent," or any other person "otherwise under a party's control." CPLR § 3126. Among the remedies a court may order for such failures to obey discovery orders is a determination that "the issues to which the information is relevant shall be deemed resolved

[†] Petitioners also note that yesterday, March 12—the last day of discovery under this Court's order—Respondents provided entirely inadequate responses to Petitioners' document requests, while relying upon already rejected privilege claims and calling improper and overbroad the very scope of discovery that this Court ordered as sufficient and necessary. Moskowitz Aff., Exhibits T–U. Given that this Court's discovery period ended yesterday, March 12, and given Respondents' failure to show up for depositions noticed under this Court's Order, comprehensive sanctions for failure to appear at the depositions against Respondent LATFOR may well provide Petitioners with relief for Respondents' egregious violations of this Court's discovery order. But if this Court believes that sanctions for Respondents' failure to appear for depositions would not suffice, Petitioners request that this Court allow the parties to address the issue at the March 14 evidentiary hearing.

for purposes of the action in accordance with the claims of the party obtaining the order." CPLR § 3126(1). Indeed, the Appellate Division has long made clear that a Court concluding that a party or person under a party's control failed to appear for validly ordered testimony is "permitted to draw an adverse inference by reason thereof." *Leahy v. Allen*, 221 A.D.2d 88, 92 (3d Dep't 1996).

Here, Petitioners served on Respondent LATFOR and certain of its members deposition notices and subpoenas, in accordance with this Court's specific grant of leave to conduct discovery on particular topics, following verbatim this Court's decision regarding permissible subjects of inquiry. *See* NYSCEF Nos.126, 135. For example, the subpoena to Eric Katz, a Democratic appointee to LATFOR, directed him to appear for a deposition and bring "[a]ll Documents and Communications concerning whether or not the map-drawing process was directed and controlled by one political party or the legislative leaders of one political party" and "[a]ll Documents and Communications concerning any public remarks or statements made by You, any public testimony You gave about the redistricting process and/or maps, and any inquiries from and any responses to the public or media about the redistricting process and/or maps," including "(i) public comments You made about the IRC and the IRC's action or lack of action; (ii) any communication between You and third-parties about advancing a partisan agenda or any efforts to undermine the constitutional process of having the IRC provide a viable map and/or viable second map; and (iii) all Documents and Communications concerning the work of the Commissioners of the Democratic Caucus of the IRC, which Documents and Communications You received from third parties." Moskowitz Aff., Exhibit F. All other deposition notices or subpoenas were worded identically, Moskowitz Aff., Exhibits A–E, G–H, and all in-person questioning adhered strictly to these topics, Moskowitz Aff., Exhibits Q–S.

Despite the fact that Petitioners' discovery requests borrow directly from this Court's own language for permissible discovery topics not barred by legislative privilege and not overly broad or burdensome, each letter objection sent by counsel for the subject Respondents reiterated that legislative privilege barred Petitioners from even scheduling these depositions. Moskowitz Aff., Exhibits J, L, N, O. But that issue was fully litigated and decided by this Court, with the Court explicitly concluding that Petitioners had the right to seek exactly this discovery notwithstanding Respondents' legislative privilege arguments. NYSCEF Nos.126, 135; *see also* Moskowitz Aff., Exhibits K, M, P.

Similarly incorrect was Respondents' contention that Petitioners had "no authority to obtain deposition testimony because neither the Court's Decision dated March 3, 2022, nor its Order dated March 9, 2022, mentions or permits depositions." Moskowitz Aff., Exhibit J. This Court explicitly authorized discovery *without limitation to form*, *see* NYSCEF Nos.126, 135, and depositions are a form of discovery, *see, e.g.*, *Lopez v. Imperial Delivery Serv., Inc.*, 282 A.D.2d 190, 197 (2d Dep't 2001) (noting that discovery "generally . . . include[s] the exchange of documents, depositions, and physical examinations"). This is hardly surprising because Petitioners expressly sought depositions in their motion seeking expedited discovery.

Given that each of these deposition notices/subpoenas is consistent with this Court's prior Decision and Order granting Petitioners' disclosure of discovery, each willful failure to appear violates CPLR § 3126, permitting this Court to draw an adverse inference for their failure to answer the questions asked at the depositions. CPLR § 3126(1); *Leahy*, 221 A.D.2d at 92. Again, Petitioners served each deponent with their notice of deposition or subpoena as soon as practicable after this Court's entry of Order, *see* NYSCEF No.135, and counsel for each deponent was made aware of the deposition sufficiently in advance, with enough time to engage in obstinate and obtuse

correspondence with Petitioners' counsel, feigning surprise or disbelief at the deposition requests, or expressing a willful misreading of this Court's own orders. *See* Moskowitz Aff., Exhibits J–P. Thus, Respondents' failures to appear for these depositions plainly supports a finding of willful refusal to abide by a discovery order under CPLR § 3126.

Respondent LATFOR's failure to appear, as a party to the proceeding, permits this Court to draw an adverse inference, and the same is true for the failures of LATFOR members Chonigman, Gianaris, and Katz, all of whom are "officer[s], director[s], member[s], employee[s] or agent[s]" of LATFOR. CPLR § 3126. For these reasons, Petitioners request that this Court consider all of the questions Petitioners' counsel posed on the record in deponents' absence, and take adverse inferences from their failure to appear.

CONCLUSION

Petitioners request that this Court draw adverse inferences against Respondents for their failure to appear for valid and lawful depositions, consistent with this Court's prior Decision and Order allowing such discovery, together with such other and further relief as the Court deems just and proper.

Dated: New York, New York

March 13, 2022

Respectfully submitted,

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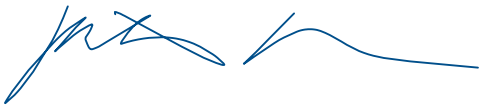
By: 

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CERTIFICATION

I hereby certify that the foregoing memorandum of law complies with the bookmarking requirement and word count limitations set forth in Rule 202.8-b of the Uniforma Rules of Supreme and County Courts. *See* 22 NYCRR § 202.8-b. This memorandum of law contains 1,794 words, excluding parts of the document exempted by Rule 202.8-b(b).

Dated: New York, New York
March 13, 2022

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