

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

THOMAS F. LIOTTI, ESQ., on behalf of himself and the Pro  
Bono Publico Bar Association, Inc.,

,

Plaintiffs,

-against-

THE NASSAU COUNTY BD. OF ELECTIONS, THE NEW  
YORK STATE BD. OF ELECTIONS, THE NASSAU  
COUNTY REPUBLICAN COMMITTEE; THE NASSAU  
COUNTY DEMOCRATIC COMMITTEE; THE NASSAU  
COUNTY CONSERVATIVE PARTY; INDEPENDENCE  
PARTY OF NEW YORK STATE; and WORKING  
FAMILIES PARTY,

Defendants.

19-cv-4264 (WFK) (LB)

THE NEW YORK STATE BOARD OF ELECTIONS'REPLY MEMORANDUM OF  
LAW IN FURTHER SUPPORT OF ITS MOTION TO DISMISS THE AMENDED  
VERIFIED COMPLAINT

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Defendant New York State Board of Elections (“State Board” or “NYSBOE”) respectfully submits this reply memorandum of law in further support of its motion to dismiss with prejudice the Amended Verified Complaint (“Am. Compl.”) (ECF No. 35).

### **PRELIMINARY STATEMENT**

For the reasons set forth below and in the State Board’s opening memorandum, Plaintiff’s Amended Verified Complaint (“Am. Compl.”) (ECF No. 35) should be dismissed. Plaintiff, an attorney and elected Village Justice, Am. Compl. ¶ 31, is representing himself in this action. He challenges the cross-endorsement of judicial candidates in Nassau County by local political parties, Am. Compl. ¶¶ 22-38, and purports to represent the interests of voters generally, claiming that cross-endorsement of judicial candidates interferes with the right to vote. *Id.* ¶¶ 39-48. In addition to the State Board, Plaintiff has sued several Nassau County political parties, the Nassau County Board of Elections, and the Nassau County Bar Association.<sup>1</sup> Plaintiff’s opposition to Defendants’ motions to dismiss is comprised of a “Composite Memorandum,” to which Plaintiff has annexed various new articles and a declaration to which he has attached a synopsis of his resume and news articles about his legal achievements.

The State Board argued in its opening memorandum that the Amended Complaint should be dismissed as against it for several reasons. First, as a state agency, the State Board has sovereign immunity under the Eleventh Amendment of the United States Constitution. Second, Plaintiff lacks standing based on his failure to allege any imminent injury in fact that is traceable to the State Board or any relationship with allegedly injured third parties whom he purports to represent. Third, Plaintiff fails to state a claim against the State Board, which is not a “person” under 42

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<sup>1</sup> In addition to the State Board’s Motion to Dismiss, the Nassau County Board of Elections, the Nassau County Bar Association, the Nassau County Republican Party and the Nassau County Conservative Party have also served motions to dismiss. *See* ECF Nos. 51, 53, 54.

U.S.C. § 1983. Fourth, he cannot prevail on the merits of his claim because courts in the Second Circuit have already held that cross-endorsements are solely a matter for decision by political parties. In opposition, Plaintiff failed to contest *any* of the grounds for dismissal of his claims against the State Board, and the Court should deem such claims abandoned and grant the State Board's motion to dismiss. Moreover, Plaintiff's opposition improperly submits irrelevant newspaper articles and documents, that the Court should disregard.

## ARGUMENT

### **I. PLAINTIFF'S FAILURE TO RESPOND TO THE STATE BOARD'S ARGUMENTS CONSTITUTES ABANDONMENT OF ANY PUTATIVE CLAIMS AGAINST THE STATE BOARD.**

As the State Board asserted in its opening memorandum, Plaintiff asserts no specific claims against the State Board and thus fails to satisfy the requirement for standing that he will imminently suffer an injury in fact that is traceable to the State Board. NYSBOE. Mem. at 6. In his opposing memorandum, Plaintiff fails to mention the State Board or to counter the arguments made in support of its dismissal from this action. Therefore, his claims against the State Board should be dismissed.

Generally, when a plaintiff fails to respond to an argument in his opposition papers, courts will deem the claim at issue to be abandoned. *Colbert v. Rio Tinto PLC*, 824 Fed. App'x 5, 11 (2d Cir. 2020) (citing *DoubleLine Capital LP v. Odebrecht Fin., Ltd.*, 323 F. Supp. 3d 393, 449 (S.D.N.Y. 2018); *see also Malik v. City of New York*, No. 1:18-cv-1956 (RB) (RML), 2020 WL 2747979, at \*2 (E.D.N.Y. May 27, 2020) (citing *Lipton v. Cty. of Orange*, 315 F. Supp. 2d 434, 446 (S.D.N.Y. 2004), *aff'd* –Fed. App'x--, No. 20-1969-cv, 2021 WL 79174, at \*2 (2d Cir. Jan. 11, 2021) (affirming dismissal of § 1983 case where plaintiff failed to respond to argument that

defendant was not a state actor).<sup>2</sup> This Court has similarly dismissed claims as abandoned in the context of both motions to dismiss and motions for summary judgment. *See e.g. Campbell-Clark v. Blue Diamond Growers*, 18-CV-5577 (WFK) (LB), 2019 WL 10852810, at \*1 (E.D.N.Y. Dec. 17, 2019) (dismissing claims on the merits and because plaintiff abandoned her claims); *Donofrio v. City of New York*, No. 04-CV-3336 (WFK) (MDG), 2012 WL 6675106, at \*1 (E.D.N.Y. Dec. 21, 2012) (granting summary judgment where plaintiff abandoned his civil conspiracy claim), *aff'd* 563 Fed. App'x 92, 94 (2d Cir. 2014); *cf. Bradshaw v. City of New York*, 15-CV-2166 (WFK) (ST), 2017 WL 6387617, at \*4 n.6 (E.D.N.Y. Aug. 22, 2017) (addressing merits of plaintiff's claim in light of his *pro se* status).

Here, Plaintiff's *pro se* status does not preclude a finding that he abandoned his claims against the State Board. Plaintiff is not only a licensed attorney as he states in his Amended Verified Complaint, Am. Compl. p.1, he is an elected Village Justice in Nassau County. *Id.* ¶ 31. Perhaps Plaintiff did not address the merits of the State Board's arguments because he understands that at the very least he has no basis to counter the State Board's argument that it is immune under the Eleventh Amendment. Whatever his reasons for failing to reply with particularity to the State Board's standing and merits arguments, the fact remains that he failed to do so. Therefore, the claims against the State Board should be dismissed, with prejudice.

## **II. NEWSPAPER ARTICLES ANNEXED TO PLAINTIFFS' MEMORANDUM SHOULD BE EXCLUDED FROM THE COURT'S CONSIDERATION OF THE STATE BOARD'S MOTION TO DISMISS.**

It is well settled that "[g]enerally, consideration of a motion to dismiss under Rule 12(b)(6) is limited to consideration of the complaint itself," *Faulkner v. Beer*, 463 F.3d 130, 134 (2d Cir.

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<sup>2</sup> In *Malik*, the Second Circuit stated that the standard of review of a district court's determination that a claim has been abandoned "has not been settled" but declined to resolve the issue. *Id.*, at \*1. In *Colbert*, the panel applied an abuse of discretion standard. 824 Fed. App'x at 11 n.6.

2006), together with only those documents incorporated by reference or those of which judicial notice may be taken. *Brass v. American Film Technologies Inc.*, 987 F.2d 142, 150 (2d Cir. 1993). “When a party submits additional evidence beyond that which it may consider on a motion to dismiss the Court must convert the motion to dismiss into a motion for summary judgment or exclude the extraneous documents from consideration.” *Condit v. Dunne*, 317 F. Supp. 2d 344, 356 (S.D.N.Y. 2004).

Here, Plaintiff improperly attempts to bolster his claims by citing to sixty-six newspaper articles and annexing eight articles to his opposing memorandum. Pl.’s Mem. Exs. D-K. Two additional news articles are annexed to Plaintiff’s Declaration. These news articles are extraneous and inadmissible hearsay and should be disregarded. *R.A. v. City of New York*, 206 F. Supp. 3d 799, 804 (E.D.N.Y. 2016) (citing *McAllister v. New York City Police Dep’t*, 49 F. Supp. 2d 688, 705 n.12 (S.D.N.Y. 1999)).

**CONCLUSION**

For all the foregoing reasons, and those set forth in its opening memorandum, the State Board respectfully requests that the Court dismiss the Amended Complaint as against it, with prejudice, and grant such other relief that the Court deems necessary and appropriate.

Dated: April 30, 2021  
New York, New York

Respectfully submitted,

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