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By E-Filing

Hon. Patrick F. McAllister
Supreme Court, Steuben County
3 East Pulteney Square
Bath, New York 14810

Re: *Harkenrider et al. v. Hochul et al.*, Index No. E2022-0116CV

Dear Justice McAllister:

We represent the Senate Majority Leader in this special proceeding. We write to respond to the letter that Petitioners filed at 11:54 p.m. last night (Docket No. 49) requesting that the Court schedule a conference. For the following reasons, we respectfully submit that no conference is necessary, nor would holding a conference be appropriate.

Until late last night, there were two things pending before the Court: (i) the Petition and (ii) Petitioners' motion for leave to file an Amended Petition. Per the Court's February 9, 2022 Order to Show Cause, the Petition and the motion for leave to amend the Petition are both returnable on March 3, 2022; Respondents' papers in opposition to the Petition and the motion to amend the Petition are due by February 24, 2022; and Petitioners' reply papers are due by March 1, 2022.

Late last night, Petitioners filed a purported memorandum of law, two purported expert reports, and two purported witness affidavits in ostensible further support of the Petition. As we discussed with Petitioners during our February 10, 2022 meet and confer session and subsequent email communications, it was improper for Petitioners to wait *eleven days* after commencing this special proceeding to serve a memorandum of law, expert reports, and evidence in support of their Petition. The special proceeding that Petitioners chose to commence "is analogous to a motion and is designed to go to a hearing and determination promptly." Siegel, *New York Practice* § 554 (6th ed. 2021). On the return date, "the court shall make a summary determination upon the pleadings, papers, and admissions to the extent that no triable issues of fact are raised." CPLR 409(b). The procedure "is analogous to what the court does on an ordinary summary judgment motion within an action." Siegel, *New York Practice*, *supra*, § 556. "Thus, every hearing of a special proceeding is equivalent to the hearing of a motion for summary judgment and makes a formal motion for same unnecessary." *Buckley v.*

Zoning Board of Appeals of City of Geneva, 189 A.D.3d 2080, 2081 (4th Dep't 2020). Petitioners should have submitted all of their moving papers together with their Petition eleven days ago. Indeed, we do not read either of the Court's two Orders to Show Cause to permit Petitioners to serve additional papers in ostensible support of the Petition other than the reply papers that the Court directed them to file by March 1, 2022.

Although there is a compelling basis for Respondents to move to strike Petitioners' belated and unauthorized memorandum of law, expert reports, and affidavits, and although it will be challenging for Respondents to file papers in opposition to those belated and unauthorized filings by the February 24, 2022 deadline set in the Court's second Order to Show Cause, we previously told Petitioners that we would refrain from moving to strike, and that we would not seek to extend the February 24, 2022 opposition deadline, if Petitioners filed all papers in support of the Petition by yesterday, thereby giving Respondents ten days to respond. Petitioners agreed to that proposal.

There thus is nothing for the Court to discuss with the parties regarding the schedule governing the Petition or the motion to amend the Petition. All of Petitioners' moving papers have been filed, Respondents' opposition papers are due by February 24, 2022, Petitioners' reply papers are due by March 1, 2022, and the return date is March 3, 2022.

The only decision that currently is ripe for the Court's consideration is the schedule for hearing Petitioners' new motion for leave to conduct expedited discovery, which Petitioners filed by Order to Show Cause at 11:52 p.m. last night. With respect to the return date on that motion, the Court has no discretion to set any return date other than the return date for the Petition: "Motions in a special proceeding, made before the time at which the petition is noticed to be heard, shall be noticed to be heard at that time." CPLR 406. This CPLR provision makes clear that any motions in this special proceeding "shall" be heard on the March 3, 2022 return date. It is hornbook law that if a motion in a special proceeding "is made before the return day of the proceeding itself, it *must* be made returnable at the same time." Siegel, *New York Practice* § 554 (6th ed. 2021) (citing CPLR 406; emphasis added); Patrick Connors, *Practice Commentaries* CPLR § 2221, C221:4 ("CPLR 406 also requires that a motion made in the context of a special proceeding be made returnable at the same time as the special proceeding"); Vincent Alexander, *Practice Commentaries* CPLR 406 (the return date of a motion in a special proceeding "is to be set for the hearing on the petition"). Petitioners therefore are free to make any motion they believe is appropriate, so long as they notice it to be returnable on the March 3, 2022 return date that the Court has fixed for the Petition. Indeed, because there still are sixteen days before the March 3, 2022 return date, and because the Court has no discretion to set any other return date for the new motion, Respondents could have moved for expedited discovery by ordinary motion under CPLR 2214(b).

With respect to the deadline for Respondents to submit papers in opposition to Petitioners' motion for expedited discovery, we respectfully request that the Court order such papers to be served by February 24, 2022, the same deadline for responding to the pending Petition and the pending motion to amend. It is well established that disclosure is not permitted in a special proceeding – at all, much less on an expedited basis – without leave of Court. See CPLR 408 ("Leave of court shall be required for disclosure except for a notice under section 3123."); *Aylward v. Assessor, City of Buffalo Bd. of Assessment Review for City of Buffalo*, 125 A.D.3d 1344, 1345 (4th Dep't 2015) (reversing Supreme Court's grant of certain discovery because party failed to meet burden of showing discovery was necessary to prepare their defense), *appeal dismissed*, 25 N.Y.3d 1056; *Town of Wallkill v. N.Y. State Bd. of Real Prop. Servs.*, 274 A.D.2d 856, 860 (3d Dep't 2000) (petitioner was not entitled to any of the requested discovery, having failed to "establish[] that [it was] essential to establish its position"); *People v. Condor Pontiac, Cadillac, Buick and GMC Trucks, Inc.*, Index Nos. 02–1020, 19–02–0497, 2003 WL 21649689, at *4 (Sup. Ct. N.Y. Cnty. 2003) (noting that "[a] party seeking discovery in a [special] proceeding carries a heavy burden to justify its use" and that the party "must demonstrate special or unusual circumstances which would justify permitting discovery"). Respondents' reasons for opposing Petitioners' motion for expedited discovery are of course beyond the scope of this letter. We note, however, that although Petitioners assert that they are seeking only "limited" discovery, Petitioners' proposed discovery demands include a shockingly broad demand for "All Documents and Communications concerning the subject matter of the Amended Petition," thereby implicating a potentially extreme and impossible burden of production on Respondents, significant issues regarding legislative privilege and other potentially applicable privileges, and other serious issues that could not possibly be addressed adequately on anything close to the schedule Petitioners' appear to be urging.

We note further that Petitioners' motion for expedited discovery is not accompanied by the Affirmation of Good Faith that subsections (a) and (c) of Rule 202.7(a) expressly require. During the parties' first meet and confer session, which took place on February 10, 2022, Respondents asked Petitioners to describe the documents they would be seeking and to identify the witnesses they would be seeking to depose. Not only were Petitioners unprepared to answer those questions, they declined even to identify the number of depositions they would be seeking to take. The parties agreed that Petitioners would follow up later in the day with an initial written proposal, which they did. Respondents' response to that initial proposal included, among other things, expressing concern about the breadth of Petitioners' initial proposal and the impossibility of doing what Petitioners seemed to be contemplating on a compressed schedule. Respondents nevertheless emphasized in writing that they would continue to seek compromise and welcomed further discussions. Petitioners responded by promising to "carefully consider[]" the concerns Respondents had expressed, but Petitioners never followed up and never sought to meet and confer further, which apparently explains their failure to submit

the required Affirmation of Good Faith, and which is reason enough to deny their motion. *See*, *e.g.*, *See Baez v. Sugrue*, 300 A.D.2d 519, 521 (4th Dep't 2006) (reversing as abuse of discretion trial court's grant of motion to compel because the movant failed to submit a compliant affirmation of good faith as required by Rule 202.7); *Yargeau v. Lasertron*, 74 A.D.3d 1805, 1806 (4th Dep't 2010) (same).

To repeat, Respondents' bases for opposing Petitioners' motion for expedited discovery are beyond the scope of this letter and will be addressed in detail in Respondents' forthcoming opposition papers. For the moment, we merely are giving the Court a sense of the weighty issues that this motion implicates and asking the Court to direct Respondents to file their opposition papers by February 24, 2022.

Petitioners' letter also alludes to a potential injunction enjoining imminent election deadlines. Interfering with an election process on the eve of its commencement is forbidden. See *Purcell v. Gonzalez*, 549 U.S. 1 (2006) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls."); *In re Khanoyan*, 65 Tex. Sup. Ct. J. 207, 2022 WL 58537 (Jan. 6, 2022) (denying challenge to redistricting for 2022 election because of the timing of the election and nature of the relief sought); *Alliance for Retired Americans v. Secretary of State*, 240 A.3d 45 (Maine 2020) (denying injunctive relief, and holding that court should not alter rules on the eve of election). Notably, Petitioners have not moved for an injunction, and this issue has not been briefed beyond a single paragraph at the end of the Memorandum of Law that Petitioners belatedly filed last night. As explained above, this issue, along with any others, must be heard on the March 3, 2022 return date. It would be highly improper for the Court to address such a fraught issue as enjoining imminent statutory election deadlines, which has not been briefed or addressed at all by Respondents, at an informal teleconference that itself is not even permitted under CPLR 406.

Counsel for the Speaker of the Assembly approves of and joins this letter. We respectfully suggest that it would be prudent for the Court to afford the Attorney General a reasonable opportunity to be heard before taking any action.

For the foregoing reasons, we respectfully request that the Court set a March 3, 2022 return date for Petitioners' motion for expedited discovery and direct Respondents to file opposition papers by February 24, 2022. We further respectfully request that the Court deny Petitioners' request for a conference, which is not necessary and would not be appropriate. We thank the Court for its attention to this letter.

Respectfully submitted,

Eric Hecker

cc: All Counsel of Record