At an IAS Term, Special Election Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of October, 2012.

P R E S E N T:

HON. DAVID I. SCHMIDT,

Justice.

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IN THE MATTER OF THE APPLICATION OF RUSSELL C. GALLO,

Petitioner,

-against-

Index No. 700026/12

BEN AKSELROD AND THE BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondents,

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The following papers numbered 1 to 3 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1
Opposing Affidavits (Affirmations)	2
Reply Affidavits (Affirmations)	
Affidavit (Affirmation)	
Other Papers Akselrod's Answer	3

Upon the foregoing papers, respondent Ben Akselrod (Akselrod) moves for an order dismissing the petition.

Under the circumstances of this case, the petition must be denied and the proceeding must be dismissed, as meaningful relief cannot be afforded in accordance with the Elections Law.

If the court could reach the merits, it would make the following findings:

The instant Election Law §§ 16-102 and 16-106 proceeding arises out of a close September 13, 2012 Independence Party primary election for Member of Assembly from the 45th Assembly District. This Independence Party primary was an uncontested primary. As such, no candidate names were printed on the ballots, and the Independence Party voters could only vote by writing-in the name of the candidate. Petitioner Russell C. Gallo (Gallo)[1] alleges that he (Gallo) and respondent Akselrod[2] were the only candidates who ran write-in campaigns for the vacant Independence Party line for the office of Member of Assembly for the 45th Assembly District. It is undisputed that, after the initial canvas of the Independence Party ballots conducted on September 20, 2012, respondent The Board of Elections in the City of New York' (Board) determined that Akselrod had won by three votes. Given the narrow margin of votes, the Board, pursuant to its own rules, conducted a manual re-canvass of the ballots on September 29, 2012. The tally of votes for this manual re-canvass was 16 for Akselrod, 13 for Gallo, 5 for non-party Steven Cymbrowitz, 1 for non-party James Grande, 1 unattributable write-in, and 3 unrecorded ballots (i.e., no name was written in on the ballot).

In the petition, Gallo contends that he monitored the initial canvass conducted on September 20, 2012, and that during this canvas he noticed that five independence party

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[1] Gallo is the Republican Party and Conservative Party candidate for Member of Assembly for the 45th Assembly District.

[2] Akselrod lost the Democratic Party primary for Member of Assembly for the 45th Assembly District.

voters in four election districts (the 5th, 22nd, 58th and 81st Districts, respectively) had signed into their respective poll sites, yet no Independence Party Ballots were cast in those election districts. In addition, Gallo has submitted affidavits from the five Independence Party voters, who each state that they went to their respective poll sites, signed in, and were given ballots on which they wrote-in Gallo's name. Gallo contends that, based on the discrepancy between the voter's assertions that they cast write-in ballots and the absence of Independence Party ballots from those districts, that the voters were handed Democratic Party ballots by the poll workers. Accordingly, Gallo, in the Order to Show cause, contends that the court should issue an order correcting the canvass to count these five votes in his favor, and declaring him to be the duly elected Independence Party nominee for the Office of Member of Assembly for the 45th Assembly District. In the alternative, Gallo requests that if the irregularities render it impossible to determine a winner of the primary, that the Independence Party shall not field any candidate for the office of Member of Assembly for the 45th Assembly District.

On October 3, 2012, this court held oral argument with respect Akselrod's contention that Gallo failed to join and serve necessary parties before the statute of limitations expired and that the petition fails to state a claim on which relief may be granted. During the argument (and in his brief submitted to the court prior to the argument), counsel for Akselrod conceded that he found no legal basis for the court to hold that all of the opposing candidates in a primary determined by write-in voting are necessary parties to a proceeding challenging that primary, and, as such, withdrew that

portion of necessary party argument.[3] Akselrod also asserted that the Independence Party and the Committee to Receive Notices were also necessary parties to the extent that Gallo's requested relief includes a request that the Independence Party line for the office of Member of the Assembly for the 45th Assembly District be left blank.

At the oral argument, the parties essentially agreed to the underlying facts at issue in this proceeding.[4] Namely, they agree that approximately 60 Independence Party voters signed-in to vote at the Independence Party Primary on September 13, 2012, but that only 39 Independence Party ballots were received by the Board of Elections. There is also no real disagreement that many of the approximately 21 Independence Party voters for whom the board did not receive a ballot were mistakenly handed Democratic Party ballots. In support of this position, Gallo points to above noted affidavits he submitted in support of the petition from Independence Party voters who assert they wrote in Gallo's name on the ballot, yet there were no Independence Party ballots recorded from those districts. In addition, the tally for the Democratic Party primary held on September 13, 2012 shows that petitioner received three write-in votes, and that there was also another write-in vote submitted for Gallo that was not recorded because it was submitted in a spot for the

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[3] In so conceding, counsel also noted the practical difficulty in naming and serving all write-in candidates, some of whom may be fictitious write-in names such as "Mickey Mouse."

[4] Counsel for both Gallo and Akselrod represented that they were close to agreeing to a stipulation of facts at issue in this proceeding and would submit such a stipulation to the court by 10:00 A.M. on October 4, 2012. The parties, however, were apparently unable to finalize such a stipulation. Given the court's resolution of the proceeding, no hearing is required, and the court need not determine whether Gallo has waived his right to such a hearing.

wrong political office.[5] Aside from Gallo's proof, Counsel for Akselrod represented that he had four affidavits from Independence Party voters who filled in a bubble next to Akselrod's name on a primary ballot, an act they could have only done on a Democratic Primary ballot. The Board also essentially conceded that many of these 21 Independence Party voters, who signed in but for whom no Independence Party ballot was found, were mistakenly handed Democratic Party ballots by the poll workers.

Apart from these facts relating to the actual conduct of the primary, the Board asserts that it must begin preparing the ballots for the general election on Friday, October 5, 2012. The Board essentially represents that it would be unable to comply with an order directing a change in the ballot after that date because of the difficulty associated with preparing ballots to be used on the still relatively new electronic scanning equipment. Aside from the practical difficulties associated with preparing such ballots, the Board notes that state administrative rules require it to perform test runs of the Ballots using the electronic scanners in order to insure that the ballots properly scan. Neither Gallo nor Akselrod made any factual or legal argument regarding the Board's position relating to its ability to the prepare the ballots for the general election.

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[5] Based on the Democratic Party tallies, Gallo conceded that one of the five voter's in the affidavits submitted must have been mistaken. Of note, non-party Steven Cymbrowitz won the Democratic Party primary, receiving 1,922, Ben Akselrod received 1,628, Gallo received 3 write-in votes, five other persons each received 1 write-in vote and there was one unattributable write-in vote.

Turning to the legal contentions of the parties, the court is not bound by the Akselrod's concession that the persons, other than Akselrod, who received write-in votes in the Independence Party primary, are not necessary parties to this proceeding since the court can raise the issue of necessary parties on its own motion (*Matter of Estate of Prospect v New York State Teachers' Retirement Sys.*, 13 AD3d 699, 700 [2004]; *see also Lezette v Board of Educ., Hudson County School Dist.*, 35 NY2d 272, 282 [1974]; *Rumman v Reade*, 64 AD3d 715 [2009]). Nevertheless, under the circumstances here, the court finds that the other persons who received votes are not necessary parties since their presence is not required to provide complete relief amongst the persons who are parties and they will not be inequitably affected by a judgment in the proceeding (*see Matter of Boudreau v Catanise*, 291 AD2d 838, 839 [2002]; *see also Matter of Master v Pohanka*, 43 AD3d 478, 479 p[2007]). Of note, in this respect, the position of the persons who received write-in votes other than Akselrod will remain unchanged if the petition is denied, and will only improve if the petition is granted and a new primary is ordered.[6]

As noted above, Akselrod also contends that the Independence Party and the Committee to Receive Notices are necessary parties to the extent that Gallo's relief includes an order directing that the Independence Party line on the general election ballot be blank. Regardless of whether Gallo has properly withdrawn this request for relief,[7] the

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[6] As discussed below, the only relief available to Gallo would be an order directing a new primary.

[7] As stated in a letter from Akselrod's counsel dated October 4, 2012, the parties did not agree to a stipulation allowing the withdrawal of that request for relief.

court has no authority to grant a request that the party line be left blank under Election Law §§ 16-102 and 16-106 (*see Matter of Scaringe v Ackerman*, 68 NY2d 885, 886 [1986], *affirming on the opinion below* 119 AD2d 327 [1986][court's jurisdiction in election matters is limited to those powers expressly conferred by statute]; *New York State Comm. of Independence Party v New York State Bd. of Elections*, 87 AD3d 806, 809-810 [2011]). As such, the Independence Party will have a candidate on the ballot regardless of the relief granted by the court. Since no action of the Independence Party and the Committee to Receive Notices is at issue, and since their only interest they could have in this proceeding is to insure that the Independence Party has a candidate on the ballot, this proceeding in no way involves any interests they may have in the election. The Independence Party and the Committee to Receive Notices are thus not necessary parties (*see Matter of Master v Pohanka*, 44 AD3d 1050, 1052 [2007]; *Matter of O'Brien v Seneca County Bd. of Elections*, 22 AD3d 1036, 1036-1037 [2005]; *cf. Matter of Cass v Krakower*, 13 NY3d 118, 119 [2009][committee to receive notices is a necessary party in proceeding related to an opportunity to ballot petition]; *see also Matter of Schultz v Farkas*, 36 Misc3d 1231 [A], 2012 NY Slip Op 51571 [U] [Sup Ct, Albany County, 2012][discussing the role of the committee to receive notices in the context of opportunity to ballot petitions]).

Moving beyond these procedural objections, Akselrod contends that Gallo's petition fails to state a claim for which relief may be granted. Gallo's petition fails to state a claim to the extent that Gallo requests that this court correct or adjust the Board's

count and declare him the winner of the primary. The court's power to make rulings with respect to the Board's canvas of the votes derive from Election Law § 16-106. A Supreme Court's only powers under section 16-106 "are (1) to determine the validity of protested, blank or void paper ballots and protested or rejected absentee ballots and to direct a recanvass or correction of any error in the canvass of such ballots * * * and (2) to review the canvass and direct a recanvass or correction of an error of performance of any required duty by the board of canvassers" (*Matter of Delgado v Sunderland*, 97 NY2d 420, 423 [2002][internal quotation marks omitted]). The courts powers under section 16-106 do not extend to taking extrinsic evidence of a voter's intent in casting a ballot (*see Matter of Corrigan v Board of Elections of Suffolk County*, 38 AD2d 825, 827 [1972], *affd* 30 NY2d 603 [1972]). Thus, even if this court were to credit the representations contained in the affidavits submitted by Gallo, the court cannot, under section 16-106, declare those votes, apparently made on democratic ballots, to have been made for Gallo by Independence Party voters in the Independence Party primary. While Election Law § 16-102(3) grants a court power to address fraud or irregularity in a primary, issues that go beyond the facial validity of vote appearing on the ballot or the propriety of the Board's canvass, the only relief provided under that section is that a court may direct the holding of a new primary election and does not include the declaration of a winner of the primary. In any event, the facts as alleged in the petition, and essentially agreed to by the parties before the court during oral argument, would not allow a direction that petitioner be declared the winner, since the irregularity at issue makes it impossible to determine the

winner of the primary (Election Law § 16-102[3]; *Matter of DeSapio v Koch*, 14 NY2d 735, 736 [1964]).

On the other hand, the facts as alleged in the petition, and the facts, as essentially conceded during oral argument, demonstrate that petitioner has a claim that there was such an "irregularity as to render impossible a determinations as to who rightfully was nominated"as the Independence Party candidate for the office of member of assembly for the 45th Assembly District and would allow the court to direct the holding of a new Independence Party primary (Election Law § 16-102[3]). Akselrod, however, contends that Gallo has waived the right to request the ordering of a new primary because such relief was not specifically requested by Gallo in his order to show cause or petition. Akselrod further contends that Gallo cannot move to amend his pleadings to add such a request for relief because the statute of limitations has passed.

Gallo's failure to specifically request the ordering of a new primary in the order to show cause is not fatal to his claim. Gallo gave notice that Election Law § 16-102 served as a jurisdictional basis for his claims, and in paragraph 9 of his petition, he noted that the court had the power under section 16-102(3) to direct the holding of a new primary election. Given that the petition gave notice that petitioner was invoking the court's jurisdiction under Election Law § 16-102, Akselrod has not been prejudiced by Gallo's failure to specifically request the ordering of a new primary, and the court can grant such relief (*see* CPLR 402, 3017; *Matter of Rosen v Goldhaber*, 73 11841185-1186 [2010]; *Torre v Giorgio*, 51 AD3d 1010, 1011 [2008]).

Here, the poll workers handing Democratic Party ballots to Independence Party voters is an irregularity since the election law requires that voters only vote in the primary of the party of which they are a member (Election Law § 8-302[4]). Although the Board argues that the voter's themselves bore the responsibility for voting on the wrong ballots, this court finds the error of the poll workers more akin to actions by poll workers that the Court of Appeals found to constitute ministerial error in *Matter of Panio v Sunderland* (4 NY3d 123, 127-128 [2005]) and is distinguishable from cases where the voter failed to follow directions regarding the placement of the write-in vote on the ballot (*see Matter of Brownson v Andrews*, 90 NY2d 949, 950 [1997]). Namely, in *Panio*, the court concluded that certain votes on affidavit ballots were the result of ministerial error on the part of poll workers where the poll workers had handed voters affidavit ballots even though the voters had appeared at the correct polling station and could have been directed to their correct voting table (*id.* at 128). Although the majority of cases involving irregularities address situations where the votes of the non-party member are counted in the primary at issue (*see e.g. Matter of Ippolito v Power*, 22 NY2d 594, 596-597 [1968]; *Matter of Hunter v Orange County Bd. of Elections*, 55 AD3d 760, 761-762 [2008], *reversed on other grounds* 11 NY3d 813 [2008]; *Matter of Komanoff v Dodd*, 114 AD2d 429 [1985]), this court finds the that the reverse situation here has the same consequence of possibly changing the result of an election (*see Matter of Piazza v The Rockland County Bd. of Elections*, 17 Misc3d 1111 [A], 2007 NY Slip Op 51921 [U][Sup Ct, Rockland County,

2007][poll workers gave voters improper directions regarding the casting of write-in votes]).

Finally, Akselrod asserts that petitioner has failed to show that the irregularity would have changed the result of the election. Petitioner has submitted affidavits from four Independence Party voters who were apparently given the wrong ballot, and who represent that they wrote-in Gallo's name. Although Akselrod has submitted affidavits from four Independence Party voters who were also apparently given the wrong ballot on which Akselrod's name appeared and assert that they voted for Akselrod, these affidavits nevertheless show that the irregularities affected more than a few voters. Accordingly, given that the difference in the election was only three votes, and that the evidence shows that a sufficiently large number of the 21 Independence Party voters who signed-in to vote, but for whom no Independence Party ballot was given were actually given democratic party ballots, the irregularities here would be sufficient to "establish the probability that the result would be changed by a shift in, or invalidation of the questioned votes" (*see Matter of Ippolito*, 22 NY2d at 597-598; *Matter of Hunter*, 55 AD3d at 761-762; *Matter of Komanoff*, 114 AD2d at 429-430; *cf. Matter of De Martini v Power*, 27 NY2d 149, 151 [1970]).

Despite what it sees as meritorious claims, that - if a hearing were held - would likely mandate an order directing a new primary. Such relief, however, cannot be granted at this time. In light of the representations of the Board relating to the time it needs to prepare the ballots, this court cannot determine the merits, as it would be impossible to

render meaningful relief in compliance with the election law (*see Matter of Hunter v Orange County Bd. of Elections*, 11 NY3d 813, 815 [2008]; *Matter of King v Board of Elections in City of New York*, 65 AD3d 1060, 1061 [2009]; *Matter of Breitenbach v Heffernan*, 245 App Div 374, 376 [1935]).

While there is no statutorily mandated last day on which a court may order a new primary,[8] the Board has represented the difficulties it faces in preparing the new ballots for the scanning machines, which once a board adopts the use of, must be used in the elections (Election Law § 7-200[1]). Some of the time required to prepare the ballots can also be attributed to administrative rules requiring the testing scanning of the ballots (9 NYCRR 6210.8). Aside from the time needed to prepare the ballots, the court is cognizant that the Board would need time to prepare for a new primary, time to give the voters notice of such a primary, and that, following a new primary, the Board would need time to canvass the votes. It would appear that the earliest that a new primary could fairly be directed would be on or around October 16, 2012, a date only three weeks before the general election on November 6, 2012. Such a date would simply leave the Board insufficient time to canvass the results of a new primary and prepare a ballot in time for the general election.

The result here is unfortunate, since petitioner Gallo, as discussed above, has presented what appears to be a meritorious claim which would entitle him to an order

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[8] Election Law § 16-102(4) only expresses a preference that the final order in such a proceeding be made "if possible" five weeks before the day of the election.

directing a new Independence Party primary. Further, Gallo cannot be charged with any delay in commencing or prosecuting this proceeding, as he timely commenced it on Monday, September 24, 2012, only four days after the Thursday, September 20, 2012 canvas at which Akselrod was found to have three more votes than Gallo, and at which Gallo represents he first learned discovered the possibility of voting irregularities. Assuming that greater familiarity with the new ballot and scanning procedures will not reduce the time the Board needs to prepare ballots, it would appear appropriate that the legislature take action, and perhaps provide for more time between the primary and the general election in order that the judiciary can conduct meaningful review of primary election

The foregoing constitutes the decision, order and judgment of the court.

ENTER

HON. DAVID I. SCHMIDT

J.S.C.