

<b>Braithwaite v Francois</b>
2021 NY Slip Op 30690(U)
March 2, 2021
Supreme Court, New York County
Docket Number: 654162/2020
Judge: Louis L. Nock
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM**

*Justice*

-----X

PAUL BRAITHWAITE and ANTHONY GORDON,  
  
Plaintiffs,

- v -

SHAUN FRANCOIS, as President of NEW YORK CITY BOARD OF EDUCATION EMPLOYEES LOCAL 372, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, and YVETTE ELLIOTT, or her successor in office, as Chairperson of the ELECTION COMMITTEE OF THE NEW YORK CITY BOARD OF EDUCATION EMPLOYEES LOCAL 372, AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES,

Defendants.

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INDEX NO.	654162/2020
MOTION DATE	09/02/2020, 09/11/2020
MOTION SEQ. NO.	001 002

**DECISION + ORDER ON MOTION**

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 28, 39, 41, 43, 44, 45, 51, 52

were read on this motion to/for STAY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 40

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, and after argument, the motion of plaintiffs Paul Brathwaite<sup>1</sup> and Anthony Gordon for an order restraining and enjoining defendants for the pendency of this action (motion seq. no. 001) is granted to the extent set forth herein, and the motion of defendants Shaun Francois (as President of New York City Board of Education Employees Local 372, American Federation of State, County and Municipal Employees) and

<sup>1</sup> The court understands from the filings that Mr. Brathwaite’s name was misspelled as “Braithwaite” in the caption.

Yvette Elliott, or her successor in office (as Chairperson of the Election Committee of the New York City Board of Education Employees Local 372, American Federation of State County and Municipal Employees) (motion seq. no. 002) to dismiss the amended verified complaint is denied, in accord with the following memorandum. The motions are consolidated here for decision.

### **Background**

This is an action seeking injunctive relief related to conduct of a local public employees' union. New York Board of Education Employees Local 372 ("Local 372") is a 22,000 member union representing non-pedagogical employees at the New York City Department of Education (Amended Verified Complaint ¶ 3).<sup>2</sup> Local 372 is affiliated with the American Federation of State, County and Municipal Employees ("AFSCME") and is a constituent of AFSCME's administrative subdivision, District Council 37 ("DC 37") (*id.* ¶ 4). The plaintiffs are members of Local 372. Defendant Shaun Francois is the President of Local 372 (*id.* ¶ 6).

Plaintiffs commenced this action for an injunction and related relief in connection with Local 372's election for officers and union delegates. Under the terms of the Local 372 Constitution (the "Constitution"), general elections are to be held every year in June (*id.* ¶ 7). Elections are by secret ballot, and only "members may vote" (*id.*). Elections are run in accordance with the AFSCME Election Code and the AFSCME Election Manual (*id.*). Under the Constitution, nominations for office are to be held at the May Membership Meeting, and the election is to take place at various poll sites around New York City on the date of the June Membership Meeting (*id.* ¶ 8). This leaves a 30-day period for nominated candidates to campaign among union members.

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<sup>2</sup> Except as otherwise noted, the facts are set forth here as alleged in the amended verified complaint and are accepted as true for the purposes of this motion, as required on a motion to dismiss.

The Constitution provides for the election of the following positions with qualifications as set forth as follows:

## **Article VI**

### **Local Union Officers, Local Union Trustees, Chapter Officers and Delegates**

Section 1. The officers of this local shall be: president, executive vice-president, second vice president, two sergeant-at-arms, recording secretary, secretary-treasurer and two executive board members elected from each chapter, and these officers shall constitute the executive board of this union. Officers other than executive board members shall be elected for a three-year term and not more than four officers shall be elected from any one chapter.

Section 2. There shall be elected a minimum of three (3) members who shall serve as trustees. Trustees are not on the executive board of the local. The trustees shall be elected as follows: three (3) trustees shall be elected for a three (3) year term. Election for all three (3) trustees shall be conducted at the same day and time as the election for the officers of this local as indicated in Article VII, Section 1, of this constitution.

....

Section 4. Positions as delegates to District Council 37 and the central labor council shall be filled by election from among the officers or from rank-and-file members as the case may be. An officer shall not be disqualified from election as a delegate solely by reason of his/her position as officer.

## **Article VII**

### **Nominations and Elections**

Section 4. To be eligible for office, a member must be in good standing with the local for one year immediately preceding the election and employed in those job classifications within the jurisdiction of the local for a period of twelve (12) consecutive months prior to the month of nomination. All officers of the local shall be considered as meeting the requirement of being employed in those job classifications within the jurisdiction of the local for the purposes of being eligible to run for local office.

....

Section 6. All matters concerning nominations and elections shall be subject to the provisions of Appendix D, entitled Elections Code, of the International Constitution, and which is made a part of this constitution by reference.

(NYSCEF Doc. No. 5.)

Appendix D of the AFSCME Election Code states as follows:

Section 2. Election of subordinate body officers.

A. To be eligible for election, a nominee must be a member in good standing of the local union in which the nominee seeks office or of a local affiliated with the council in which the nominee seeks office, and must meet such other conditions as are stipulated in the constitution of the subordinate body.

D. Not less than fifteen days prior to the holding of nominations for local union officers, a notice of the nominations and elections shall be mailed to each member at the member's last known home address.

(NYSCEF Doc. No. 7.)

In 2020, Local 372 ceased having membership meetings due to the COVID-19 pandemic (Amended Verified Complaint ¶ 13). Plaintiffs allege that, on an unknown date, Mr. Francois appointed an Election Committee to conduct a general election, and thereafter Ms. Elliott was appointed as Chair of the Elections Committee (*id.* ¶ 14). On or about August 15, 2020, a Notice of Nominations and Elections (the "Notice") was mailed to Local 372 members (*id.* ¶ 15; NYSCEF Doc. No. 17). The Notice announced that nominations for the election must be made by August 25, 2020, and that the attendant ballots would be mailed out "on or about" September 3, 2020, and tallied on September 29, 2020 (*id.* at 2, 4).

The Notice also contained provisions whereby members could submit a "slate" of candidates for nomination. These included the following relevant provisions:

"Below is the list for all positions for Nominations and Election:

- (1) PRESIDENT
  - (1) EXECUTIVE VICE PRESIDENT
  - (1) 2<sup>ND</sup> VICE PRESIDENT
  - (1) SECRETARY TREASURER
  - (1) RECORDING SECRETARY
  - (2) SERGEANT-AT-ARMS
  - (3) TRUSTEES
  - (25) DELEGATES TO DISTRICT COUNCIL 37\*
- (\* Local 372 is entitled to 26 Delegates to District Council 37 and by the virtue of the position, the President will be an automatic Delegate)"

(NYSCEF Doc. No. 17 at 1.)

**“THE OFFICIAL NOMINATIONS FORM for the FULL SLATE which includes (1) President, (1) Executive Vice President, (1) 2nd Vice President, (1) Secretary-Treasurer, (1) Recording Secretary, (2) Sergeant at Arms, (3) Trustees and (25) Delegates to D.C. 37 positions as well as THE OFFICIAL NOMINATIONS FORM for INDEPENDENT CANDIDATE can be completed and submitted using one of the following 3 options:”**

(*Id.* at 2 [boldface and underscoring in original].)

**“. . . Please remember, in order to have a slate box on the ballot, each position must have an eligible candidate nominated.”**

(*Id.* [boldface in original].)

“To make a nomination, the nominator must be a member in good standing in Local 372. Self-nominations are permitted. Nominations for a group or slate of candidates are permitted. A group of candidates will only be designated a slate for purposes of having a slate voting box on the election ballot if the group has an eligible candidate for all of the offices and positions of **(1) President, (1) Executive Vice-President, (1) 2nd Vice President, (1) Secretary-Treasurer, (1) Recording Secretary, (2) Sergeant at Arms, (3) Trustees and (25) Delegates to District Council 37**. All other candidates will be considered as an Independent Candidate.”

(*Id.* at 3 [boldface in original].)

“The ballot will be designed to enable a member to have the option to vote for a full Slate of Candidates or for Independent Candidates. **Write-in ballots are not permitted.**”

(*Id.* at 4 [boldface in original].)

After receiving the Notice, plaintiffs submitted a slate of candidates for nomination under the slate name “Team Quiet Storm” (Amended Verified Complaint ¶ 17). In addition to the other positions, the Team Quiet Storm slate included 25 candidates for the Delegate to District Council 37 position, one of whom was plaintiff Paul Brathwaite. Mr. Brathwaite was also submitted as a candidate for President. On August 28, 2020, Mr. Brathwaite received an unsigned letter from the Local 372 Election Council that advised that he would not receive a

slate box on the forthcoming ballot (*id.* ¶ 19; NYSCEF Doc. No. 20). The August 28, 2020, letter states the following:

We regretfully inform you that you will not have a slate box for your column on the official ballot of Local 372's 2020 Officers and Delegates election. This decision was made based on you failing to submit full slate. By nominating yourself for both President and Delegate to District Council 37, you did not comply with the total Delegates required for D.C. 37. The President by the virtue of the position is an automatic candidate to D.C. 37. This was clearly indicated on the Nominations and Election notice it was mailed to all members in good standing.

Please refer to the sections below from that notice:

*(\* Local 372 is entitled to 26 Delegates to District Council 37 and by the virtue of the position, the President will be an automatic Delegate)*

“Nominations for a group or slate of candidates are permitted. A group of candidates will only be designated a slate for purposes of having a slate voting box on the election ballot if the group has an eligible candidate for all of the offices and positions of **(1) President, (1) Executive Vice-President, (1) 2nd Vice President, (1) Secretary-Treasurer, (1) Recording Secretary, (2) Sergeant at Arms, (3) Trustees and (25) Delegates to District Council 37**. All other candidates will be considered as an Independent Candidate.”

(NYSCEF Doc. No. 20 [boldface in original]). On August 29, 2020, plaintiff Anthony Gordon emailed the Election Committee to object to the decision and request that that Team Quiet Storm be reinstated (Amended Verified Complaint ¶ 19; NYSCEF Doc No 21). Mr. Gordon's email also noted that the 2017 election ballot included slates that included the same individual as a candidate for both President and Delegate to District Council 37 (NYSCEF Doc. No. 21). On Monday August 31, 2020, the Election Committee held a virtual meeting where the denial of a slate box for Team Quiet Storm was reaffirmed and Mr. Brathwaite received a sample ballot showing that he would not be running as part of a slate (Amended Verified Complaint ¶ 19; NYSCEF Doc. No. 22). Instead, the Team Quiet Storm candidates were listed in a column titled

“INDEPENDENT CANDIDATES FOR **TEAM QUIET STORM**” (NYSCEF Doc. No. 22 [boldface in original]).

Thereafter, plaintiffs commenced this action asserting causes of action for breach of the Local 372 Constitution (breach of contract) and breach of the ACSCME Constitution and Election Code. In addition to the foregoing allegations, plaintiffs’ amended verified complaint also alleges that the abbreviated time frame of the election did not give them adequate time to campaign and that they were not provided the means to do a campaign mailing to union members, as provided for in the Notice and the Local 372 and AFSCME Constitutions (Amended Verified Complaint ¶ 21). Concurrent with commencement of the action, plaintiffs moved by order to show cause for a temporary restraining order, preliminary injunction, and permanent injunction, essentially restraining and enjoining defendants from conducting the Local 372 election unless and until the candidates have a reasonable time and opportunity to campaign, including the opportunity to do a mailing, and to ensure that the Team Quiet Storm slate is included on the ballot, and with Mr. Brathwaite listed thereon as a candidate for President and for District Council 37 Delegate. The order to show cause, which includes a temporary restraining order that restrained defendants from mailing a ballot to the members of Local 372 for the election of officers and delegates, was signed and entered on September 2, 2020, and remains in effect.

Defendants move to dismiss the action on the asserted ground that plaintiffs are precluded from bringing this action because they have failed to exhaust all administrative remedies; that plaintiffs have failed to state a cause of action under the governing union rules and regulations; and that plaintiffs have failed to demonstrate their entitlement to injunctive relief. Plaintiffs oppose the motion to dismiss and assert that pursuit of administrative remedies would

have been futile and, therefore, was not required due to the abbreviated time frame of the nominations period.

### **Standard of Review**

On a motion to dismiss brought under CPLR 3211 (a) (7), the court must “accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Ambiguous allegations must be resolved in the plaintiff’s favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). “The motion must be denied if from the pleadings’ four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [citations omitted]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]), but a pleading consisting of “bare legal conclusions” is insufficient (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *aff’d* 9 NY3d 836 [2007], *cert denied sub nom Spiegel v Rowland*, 552 US 1257 [2008]) and “the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts” (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

### **Discussion**

Defendants move to dismiss on the asserted ground that plaintiffs are precluded from bringing this action because they have failed to exhaust all administrative remedies; that

plaintiffs have failed to state a cause of action under the governing union rules and regulations; and that plaintiffs have failed to demonstrate their entitlement to injunctive relief.

In general terms, a party objecting to an action taken by a union should exhaust internal administrative remedies before bringing his or her claims in court; but recognized exceptions to this rule include instances where timely and adequate relief is not available or where continued administrative efforts would be futile (*see, e.g., Madden v Atkins*, 4 NY2d 283 [1958]). Here, the Notice references an administrative remedy, as follows:

The Election Committee will examine and determine the eligibility of all Nominators and Nominees, relative to their good standing following nominations. The Election Committee shall decide any challenges to the eligibility of a Nominee to run for office. A candidate may appeal the Election Committee's decision to AFSCME's Judicial Panel under Section 4 of Appendix D to AFSCME'S Constitution. Such appeal must be filed within ten (10) days of the committee' decision or forty (40) days after the challenge to a candidate's eligibility was filed, if no decision has been reached by the Judicial Panel, such an appeal will not be a basis for delaying the election.

(NYSCEF Doc. No. 17 at 3). The Local 372 Constitution (NYSCEF Doc. No. 13 § 6) and the AFSCME Local Union Election Manual (NYSCEF Doc. No. 16 at 11-12) also reference the AFSCME appeal process referenced in the Notice. The AFSCME appeal process provides, *inter alia*, that: "Any protestant or nominee adversely affected by a decision on a challenge or a protest may file a written appeal with the Judicial Panel within ten days of the subordinate body's decision, or, if no decision has been rendered, within forty days after filing the original protest with the subordinate body" (NYSCEF Doc. No. 15 § 4 [D]). That process further provides that: "If the investigation shows that there were violations which may have affected the outcome of the election, the election or any part thereof may be set aside and a new election held" (*id.*). Unsuccessful appeals

may be further appealed to the full “Judicial Panel” and then to the “International Convention” (*id.* § 4 [E], [F]).

Defendants allege that plaintiffs’ counsel is familiar with the foregoing appeal process and has utilized in connection with several matters in the past. However, plaintiffs contend that the abbreviated time frame employed by defendants in this particular instance – just one week between the date for nominations and the mailing of ballots – did not provide a workable time frame for utilization of the formal appeal process and, furthermore, that being left off the ballot or being improperly listed on the ballot constitutes irreparable injury, even considering that the appeal process provides that the election may be set aside and a new election held in the event of a favorable appeal (*see*, NYSCEF Doc. No. 43 ¶¶ 13-18).

As palpably reasonable as plaintiffs’ foregoing argument appears to be in the present circumstances (*see*, *Madden, supra*), there are additional, even more compelling, reasons justifying plaintiffs’ position that they should not be relegated to the administrative process prescribed in the union materials. A careful reading of the administrative appeal process as described in the union’s Notice reveals that it is limited to Election Committee determinations concerning “the *eligibility* of . . . Nominees, *relative to their good standing*” (NYSCEF Doc. No. 17 at 3 [emphasis added]). Here, defendants’ decision to exclude the Team Quiet Storm slate was in no way predicated on ineligibility relative to any nominee’s good standing, as they openly acknowledge in their August 28, 2020, letter rejecting the slate. That letter was specific in stating that “[t]his decision was made based on you failing to submit full slate” (NYSCEF Doc. No. 20). The asserted procedural defect of failing to submit a full slate is entirely distinct of the notion of *ineligibility* to run for the office in the first place, as amply divined from the union’s

Notice, first making allowance for “a group or slate of candidates” (NYSCEF Doc. No. 17 at 3) – the focus of defendants’ rejection letter (NYSCEF Doc. No. 20) – and then, requiring, as a distinct element, that such group or slate consist of “eligible candidate[s]” (NYSCEF Doc. No. 17 at 3). Defendants never asserted that plaintiffs are not eligible candidates, or that anyone on plaintiffs’ slate of candidates, is not an eligible candidate – in good standing (*see*, NYSCEF Doc. No. 20. *See also*, NYSCEF Doc. No. 5 [Constitution] Article VII § 4 [“To be eligible for office, a member must be in good standing . . . .”]). Indeed, the Notice’s stated procedure for administrative appeal (NYSCEF Doc. No. 17 at 3) makes specific and exclusive reference to the substantive element of nominee eligibility multiple times. Whereas the distinct technical element of insufficiency of number of candidates on a particular slate – the crux of this case, and the sole subject of defendants’ rejection letter (NYSCEF Doc. No. 20) – is, on the other hand, never once identified in that process as a genre of determination subject to administrative appeal.

Thus, because of the nature of defendants’ determination having no relation to candidate eligibility *per se*: that determination, by virtue of the union’s own constitutional and notice materials, was not subject to administrative appeal. Plaintiffs were, therefore, free to commence this action.<sup>3</sup>

Defendants next argue that plaintiffs have failed to state a claim because the Notice clearly instructs potential nominees that they must include a slate of 25 delegates that does not

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<sup>3</sup> A related action titled *Anthony Gordon and Paul Braithwaite v Shaun Francois, et al.* (index No. 654437/2020), presenting a different set of challenges relating, *inter alia*, to access to union books and records, is also pending before this court, and as to which a decision and order of this court of even date herewith has been issued. (Familiarity with said decision and order is presumed.) Said decision and order engages an alternative analysis which similarly concludes that exhaustion of administrative remedies, within the context of that action, was not necessary preparatory to commencement of that action. Although said analysis could equally apply here, the gist of the analysis set forth in *this* decision goes even further in light of the observed fact that the particular election-related materials unique to this particular action expressly limit the administrative appeal process to the issue of a nominee’s substantive eligibility to run for office, and were not more broadly applicable to include the technical issue of sufficiency of the number of candidates on a submitted slate, which was the defendants’ stated ground for rejection of plaintiffs’ slate (*see*, NYSCEF Doc. No. 20).

include the nominee for President, and that plaintiffs have failed to demonstrate their entitlement to injunctive relief. This court disagrees. At the outset, the Notice states in six different places that the available positions include, and that a full slate of candidates requires, “(25) Delegates” to D.C. 37 of Local 372 (*see*, NYSCEF Doc. No. 17 at 1-4); but there is only one single solitary parenthetical note within the entire Notice indicating that “Local 372 is entitled to 26 Delegates to District Council 37 and by the virtue of the position, the President will be an automatic Delegate” (*id.* at 1). This was, in this court’s view, woefully insufficient to put potential candidates on fair notice that they must nominate 26 individuals for the Delegate position, including the President, or 25 individuals, not including the President. And, drawing guidance from jurisprudence governing contract interpretation: to the definite extent that the Notice is embedded with such confusion – requiring union members to parse out and struggle to reconcile the six-versus-one iterations noted above – the consequence of that confusion is more justly borne by the drafter of the Notice, i.e., the union, not the union members who wish to participate in a fair, open, and democratically inclusive elective process (*see, e.g., 327 Realty, LLC v Nextel of N.Y., Inc.*, 150 AD3d 581 [1<sup>st</sup> Dept 2017]).

A motion for a preliminary injunction is appropriate where the movant shows a likelihood of success on the merits, irreparable harm absent the injunction, and a balancing of equities in favor of the injunction (*e.g., W.T. Grant Co. v Srogi*, 52 NY2d 496 [1981]).

As indicated in the above discussion, plaintiffs have, at the threshold level, demonstrated a likelihood of success on the merits of their assertions that: (i) the instant dispute is not subject to administrative appeal; and (ii) the nature and content of the union’s Notice was such that a potential candidate or slate of candidates might very reasonably have misunderstood the requirements for nomination. Consequently, this court finds that plaintiffs have shown, at this

threshold level, a likelihood of success in this litigation. As for irreparable harm, there clearly *would* be such harm should the challenged electoral procedure be allowed to go forward without inclusion of the Team Quiet Storm slate. Were this court to allow the election to go forward without the slate, and then, at the conclusion of this case, order a whole new election, this would cause unbearable instability, as well as cost, for the union and all its members. And, finally, as to balancing of the equities: the equities of the union, which drafted the Notice and related constitutional documents, ought to give way to the rights of union members who desire to participate in what is supposed to be a fair and democratic process for elective governance over many fellow union members.

In conclusion, the cross-motion to dismiss is denied and the motion for a preliminary injunction is granted to the extent set forth in the sentences which now follow. When one examines the precise relief requested in the motion, one discovers that it seeks, in essence, the ultimate relief sought in the complaint; to wit, a stay of election “unless, the candidates have a reasonable time and opportunity to campaign, . . . and unless Plaintiffs’ slate is allowed to run, on the ballot, as a slate” (Amended Verified Complaint at 10. *Compare id. with* Order to Show Cause [NYSCEF Doc. No. 28]). Because plaintiffs’ motion was made within the procedural context of a motion for provisional relief, this court does not view itself authorized at this time to grant such ultimate relief, but is procedurally constrained to go no further than continuing the temporary restraining order found in the Order Show Cause, pending further order. That said, the court, at present, perceives of no issues of fact; viewing the matter, at present, as a question of law dependent on proper interpretation of the union’s notices and governing documents.

Therefore, counsel for the parties will be directed to participate in a teleconference to discuss the

possible saliency, at this time, of a timeframe for further briefing in the nature of a motion for summary judgment.

Accordingly, it is

ORDERED that defendants' cross-motion to dismiss the amended verified complaint is denied; and it is further

ORDERED that plaintiffs' motion for a preliminary injunction is granted to the extent that the temporary restraint of election set forth in the Order to Show Cause herein (NYSCEF Doc. No. 28) is hereby extended pending further order of the court; and it is further

ORDERED that a remote video conference will be conducted – to be arranged by the court – at which counsel for the parties will appear, on April 13, 2021, at 10:00 a.m.

This will constitute the decision and order of the court.

ENTER:

<u>3/2/2021</u>				<u>LOUIS L. NOCK, J.S.C.</u>	
DATE					
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE